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SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, OCTOBER 15, 1875. { Hon. JOHN F. DILLON Contributing Editor.

A QUESTIONABLE PROPOSITION.—In Brown v. The State, 48 Ind. 38, the Supreme Court of that state held that an indictment for selling liquor on Sunday to A., is not sustained by proof that liquor was sold both to A. and B.; in other words, that proof of a sale to two persons will not sustain an indictment for selling to one of them. This is not the first time that a bench of judges have gravely denied the proposition that a *whole* includes all its *parts*. In Rogers v. Hawkins, 20 Ga. 200, it was held that under a statute exempting *fifty* acres of agricultural land from execution, *ten* acres were not exempt. Light, however, dawned upon the Georgia court in the subsequent case of Pinkerton v. Tumlin, 22 Ga. 165. Will it also dawn on that of Indiana?

THE NEW CONSTITUTION OF MISSOURI.—Wm. G. Myer, Esq., of the St. Louis bar, has rendered a valuable service to the voters of this state, and especially to such as desire to give close and careful study to the work of our late constitutional convention, by publishing a brief and succint comparison, section by section, between the present and the proposed constitution. Perhaps no better method could be employed by which to learn what are considered the imperfections of the Drake constitution, and in what way the new one would cure them. From an examination of this pamphlet, the St. Louis Globe has discovered that the proposed changes declare that popular government is a failure, that power must be taken away from those who have misused it, and that the people are not capable of choosing wise and honest public servants. If such things are brought to light, by this modest little work, it behooves us all to examine it. We apprehend, however, that it teaches us simply what we knew before, that legislatures are corrupt; that they are prone to sell out the rights of their constituents; and that, like dogs in hot weather, they should not be suffered to run at large without a muzzle. It seems, however, that the North Carolina Constitutional Convention which has just adjourned, has adopted several measures freeing their legislatures from restrictions with which they had been fettered by the previous constitution.

SPIRITUALISM AND JURISPRUDENCE.—Dr. Wharton has contributed an article under this title to the October number of Lippincott's Magazine. The title is calculated to arrest the attention; but, like the title of a good many modern works of fiction, it conveys but an indefinite idea of the subject. The greater part of it consists of an historical account of the attitude which the law has assumed towards divination, demonology and witchcraft at various periods since the rise of the Roman law. Coming nearer our own time and experience, Dr. Wharton supposes that it is possible, under certain circumstances, for one person so to act upon the nervous system of another by mere words or gestures (as by conveying to a person critically ill some alarming species of false intelligence), as to inflict upon such person death or serious bodily injury. He also supposes a fact of which we suppose there is now no doubt, that one person may so far acquire, through the effects of his will, control over the nervous system of another person, as to make that other the involuntary and perhaps the unconscious instrument of crime. Dr. Wharton discusses the principles of law which should govern these two cases, and concludes as follows: "1. If in consequence of their action on another, such other person injures himself, they are penally as well as civilly responsible for the injury. 2. If they obtain control over the will of another person, so as to make him their absolute agent, they are both penally and civilly liable as principals for what he does under this constraint."

As to those professed spiritualists who are conscious imposters, Dr. Wharton states that they are punishable for obtaining money under false pretenses, in support of which statement he cites the following authorities: Rex v. Giles, L. & D. 502; 10 Cox's C. C. 44; State v. Piper, 65 N. C. 321; Whart. C. L., 7th ed. § 2092 a.

Estoppel and Registration.

The case of McCusker v. McEvey, (9R. I. 258), calls into notice an interesting question. It seems that one Weeden conveyed with covenants of warranty certain land, to two different persons; that when he made the first conveyance he had no title, but that he had acquired a good title before making the second. The plaintiff derived his title from the first grantee, and the defendant from the second. The court, by Durfee, J., decided that "if one having no title to land, conveys the same with warranty to A., by a deed which is duly recorded, and he afterwards acquires a title and conveys to B., the purchaser of B. is estopped to aver, that the grantor was not seized at the time of his conveyance to A., the first grantee. The after-acquired title will feed the estoppel created by the conveyance to A., and conclude the grantor and all persons claiming under him. And this although the deed to A. was a deed poll, notwithstanding the *obiter dictum* in Gordon v. Greene, 5 R. I. 104. The right of the purchaser of A. to insist on the estoppel is not impaired by admitting, in an action for the possession of the land, that A's. grantor had no title when he conveyed to him." This judgment was evidently given with reluctance, and the learned judge quoted with approval the words of Comyns, (Dig. Estop., E. 2), "A man shall not be estopped when the truth appears by the same record;" also, "If the jury find the truth of the fact, the court will give judgment accordingly without regard to the estoppel." (Id. E. 10).

At the time 9 R. I. was printed, the dissenting opinion of Judge Potter was mislaid. It has since been found and published in pamphlet form, and we here give a synopsis of it. The learned judge in substance said:

This is not the case of one having title, and conveying land to one, and afterwards fraudulently conveying it again to another, who buys it *bona fide*, without notice of the former deed. Here, the grantor, having no title, conveys the land to one, and, acquiring title, conveys it to another, both *bona fide* and for consideration, and no charge is made as to the honesty of the grantor. There is

no question as to the remedy of the grantees against the grantor on his warranties. It is held that by reason of the warranty, the estate passes to the first grantee upon the grantor's acquiring it. Estoppels by matter of record or judgment are founded upon public policy, to prevent litigation. All others seem founded on one of two considerations; first, that one who has made a declaration whereby another has spent money, or labor, or has sustained damage, is estopped to deny the truth of his statement; second, to prevent circuity of action, if one has sold land with warranty, which he does not own, and afterwards acquires title to it, he and his heirs can not claim the land, because the grantee could at once sue on his warranty.

In the present instance, if it were a suit between grantor and grantee, the case would be different. By maintaining title in the first grantee, the court forces the second to sue on his warranty, and so *vice versa;* wherefore litigation is not prevented by the decision rendered. The first grantee could have found from the records what interest his grantor had, and might have required him to give security. The second grantee would have found a good title in his grantor. If more than a simple examination were required of the second grantee, a rule would be laid down which would often work great hardship. In importing the law of estoppel from England, some things have been overlooked. England has no general record system. Fines and recoveries were matters of record; feoffments were publicly notorious. Hence, as to these, estoppel extended from a grantor to his privies in estate. But the old law applied to no conveyances arising under the statute of uses, such as grant, lease and release, and bargain and sale, because these were not matters of sufficient publicity. Further, there is no privity of estate between this plaintiff and this defendant.

The equity of the case appears strongly in another light. Suppose Weeden, having title, conveyed to A. by non-recorded deed, and subsequently to B. by recorded deed, for good consideration, without notice. Under our recording laws B.'s title would be good. Can it strengthen A.'s case, that Weeden had no title when he made his first conveyance? In the present case, the records that showed Weeden's deed to A., showed also that Weeden had no title. And which one should be favored,—he who carelessly took a deed from one having no title, or he who took a deed when title was shown in his grantor by the records? *Vigilantibus et non dormientibus jura subveniunt.*

Of the covenants in Weeden's first deed, those of seizin and right to convey are, of course, personal, and were broken as soon as made. As to that of warranty, in order to run with the land there must be an estate to support it, otherwise, it, too, is personal, and on it the first grantee alone can sue. If the warranty had the effect of actually passing the estate, A. might have recovered damages, and then, when Weeden purchased, he would have the land also, thereby gaining both damages and property. Wherefore we decide for the defendant.

—THE recent Court of Cassation, has just given a decision of interest to gleaners, who have in this generation been driven out of the fields as thieves. It is now decided to be contrary to law for a farmer to turn sheep into his fields for two days after harvest, or to glean the fields himself, or to sell the right, because "the poor would thus be deprived of the benefit which humanity and law have reserved for the indigent.

Life Insurance.

FORFEITURE OF CONTRACT FOR NON-PAYMENT OF INTEREST ON PREMIUM NOTES.

In the very able article of your correspondent "Insurance" (*ante*, p. 618), reviewing the note by "J. A. F.," to Ohde v. The Northwestern Mutual Life Ins. Co. (*ante*, p. 567), it would seem that whilst "Insurance" has apparently, thoroughly mastered the points involved in the case of Grigsby v. St. Louis Mutual Life Ins. Co., (2 CENT. L. J. 123), which he discusses at length, he has been less successful with regard to the Ohde case. The question of forfeiture of contract for non-payment of interest on premium notes, is an important one, both on account of the legal points involved, and of its importance to insurance companies, and therefore to the numerous public of policy-holders directly interested in the result. "Insurance's" misapprehension of the Ohde case, appears to be the same which must have led to the judgment rendered therein, and is therefore well worthy of notice. A more thorough examination of the terms of the contract would probably have convinced him that every point made in his thorough analysis of the Grigsby case, applies with at least equal force to the Ohde case, whilst the latter presents some additional points which have been overlooked by him.

"Insurance" quotes the language of the policy, that "if the said premium, or the interest upon any note given for premiums, shall not be paid on or before the day above mentioned for the payment thereof, * * * * the company shall not be liable for the whole sum assured, *and for such part only as is especially stipulated.*" (The part referred to is as follows: "The said company further promise and agree, that if default shall be made in the payment of any premium, they will pay as above agreed, as many tenth parts of the original sum insured *as there shall have been complete annual premiums paid at the time of such default.*)." And he proceeds to comment upon the decision in the case, and "J. A. F's." remarks thereon as follows:

> In the case in question the policy of the Northwestern Mutual contains not a single feature looking to a forfeiture for the non-payment of a premium, or interest upon a note given for a premium, but, on the contrary, in every respect, was clearly a non-forfeiting policy.

Considering that the note itself contained the express provision that "the interest shall be paid annually *or the policy be forfeited*" (*ante*, p. 569), it is impossible to agree with "Insurance" concerning the "clearly non-forfeiting" character of the policy, unless by discarding what has hitherto been held to be one of the best established principles of law, that all papers executed at the same time concerning one and the same transaction, are part of the contract and are to be construed together, a principle which is moreover expressly recognized (theoretically if not practically) in the opinion of the learned judge in this case.

"Insurance" further says:

"As recited in the policy the notes were made a part of the consideration." This is perfectly true, and at once brings up the question, was it the paper of the notes with the printing and the writing thereon, which constituted that part of the consideration, or was it the agreement between the parties, of which the notes were the written expression? And if it be conceded that the agreement was the consideration as it needs must be, and if such agreement be not carried out, what

becomes of the notes, and where is their value? The consideration having, from any cause, become valueless, what becomes of the contract based upon such consideration?

It is evidenced by the contract that the consideration upon which the policy was issued, included, apart from the semi-annual cash payments, another annual cash payment of interest on every note given by the insured. That such was the intention of the company in making the contract is evident from the fact that it has elected to be sued rather than yield the point, and that it was also the intention of the insured when making the contract, is proved by the fact of his appending his signature to the note which declares that such "interest shall be paid annually, or the policy be forfeited." Where the intentions of the parties are so clearly manifested, the judgment which rules that such interest need not be paid annually, and that the non-payment of interest works no forfeiture, whatever may have been agreed between the parties to the contrary, because such interest may (or may not) be recovered by the company at some future time, is justly characterized by "Insurance," as an "attempt at judicial alteration of contracts, which inflicts the greatest wrong upon all mutual companies."

The *judgment* itself in the Ohde case is, of course, beyond criticism: not so the opinion of the learned judge, which is open to at least one legal exception overlooked by "Insurance."

The opinion states: "When the assured had made the semi-annual cash payment in July and January, executed and delivered his note for the balance of the premium as stipulated in the policy, *and paid* the interest due, if any, on the previously executed note or notes, then a 'complete annual premium' was paid. This the assured performed for two years," etc. Here is an error of fact so glaring as to make it a wonder how the mistake could so long have escaped detection. The interest upon these notes was not payable in advance, but annually when due, and the interest due July 12th, 1867, on the note "executed and delivered July 12th, 1866, *was never paid.*" For the *first year only* the insured "made the semi-annual cash payments in July and January, executed and delivered his note for the balance of the premium as stipulated in the policy, and paid the interest due." Hence only for one year was a "complete annual premium paid" according to the court's own ruling in this case, and how, under the circumstances, the charge of the learned judge to the jury, representing the widow as entitled, at the death of the insured, to two-tenths of the whole amount insured, can be reconciled with his own theory, must remain a mystery, unless the charge be admitted to have been based upon an error of fact.

It must further be observed that the principle lately sought to be established by the opinions in the Ohde case, as well as in Grigsby v. Saint Louis Mutual Life Ins. Co. (2 CENT. LAW J. 123), and Dutcher v. Brooklyn Life Ins. Co. (2 CENT. LAW J. 153), to the effect that no failure to pay interest on premium notes taken by insurance companies should be allowed to work a forfeiture of policies, although it may, and doubtless will be occasionally applied by the courts to individual cases, can never become established as a recognized principle, for the reason that it is based upon a mathematical fallacy and conflicts with the laws regulating life insurance in the different states.

The mathematical fallacy upon which it rests is the assumption that the company can always deduct the amount of the note, together with all interest accrued thereon, from the amount insured, when the policy becomes payable. This *seemingly* equitable adjustment of a question of contract, by *rule of thumb*, could be made to work in the cases cited, because the insured happened to die before they had reached the limit of the expectation of life upon which their premiums were calculated; but had they outlived that limit (and such is a daily occurrence), a simple calculation will show that a point might in each case be reached when the accrued interest, together with the principal of the note, would not only equal but exceed the amount insured. How could the company recover the difference? It would doubtless be allowed to sue the estate of the deceased for the balance due, but it is difficult to see what argument it could bring to bear against the very obvious defence that, when the insured ceased keeping up his policy by the payment of either premium or interest, he by so doing renounced all claim under such contract of insurance, and consequently was freed from all liabilities arising therefrom. And such defence would, undoubtedly be sustained by any court, as the only other alternative would be to hold that a man once insured can not cease to be insured, whether he chooses or not.

The conflict between the principle of the decisions in the cases cited and the insurance laws of the states, results from the requirements of the latter, compelling companies to hold, upon each policy, a certain stated reserve, increasing each year with the age of the insured. Taking as an example the policy in the Ohde case, the insured was aged 43 years; his total premium was $92.93, for $43.25 of which he gave his note. The cash payments for the first year were sufficient to cover the cost of carrying the insurance for that year, and the note was also sufficient to cover the reserve then needed. If at the end of the year he dropped his policy, and retained no claim against the company, the latter would have been paid for carrying the risk and would lose nothing, and the insured would have only paid for what he had received, full insurance during the year, his note having cost him nothing but the trouble of signing. But when the principle of the late decisions interferes to retain in force one-tenth of this policy, upon which no further payment of interest on the note is made, the insurance laws step in requiring the company to show, for that one-tenth continued in force, a gradually increasing reserve which, when the insured reaches the age of 53 years is $77.39; at 63 years, $95.40; at 73 years, $112.73, etc.

Where the interest paid annually (as provided in the contract in view of that very contingency), so as to be in turn invested by the company annually as such interest necessarily is, compound interest would, of course, enable the company to show at any time the requisite reserve. But when, on the one hand, the reserve of $43.25 is by the decision of the court, permitted to remain unproductive, and, on the other hand, the insurance laws of the state compel the company, under penalty of being refused the authorization to do business, to show such increase in the same reserve as is shown above, there is no possibility for a mutual company to comply with both, as it could only make good this reserve by supplying the deficiency out of the earnings of such of its members as fulfill their contracts.

There is no occasion to insist upon the incidental mention made of "dividends" in the opinions cited. When it is borne in mind that "dividends" is another name for surplus, no one will think it worth while to consider the disposition which might be made of surplus arising from a policy unable to complete its reserve. J. N. P.

Restraint of Trade.

SCHWALM v. HOLMES.*

Supreme Court of California, No. 4, 677, April Term, 1875.

Contract in Restraint of Trade.—A contract by which one party, at his own lime kiln, agrees to manufacture for another party, a certain number of barrels of lime within a given time, for which he is to receive a given sum per barrel, and which provides also that during the continuance of the agreement, the party manufacturing the lime shall not sell to any other person any lime, is not illegal, as being in restraint of trade.

Appeal from the District Court, Sixth Judicial District, County of Sacramento.

The plaintiff, on the 31st day of October, 1874, commenced this action to recover the sum of $755.50, alleged to be due him by the defendants for lime, sold by him to them, about the 25th of October, 1874, on a contract between the parties. The defendants, in their answer, by way of counter claim, averred, that on the 21st day of May, 1874, the plaintiff and defendants entered into an agreement of which the following is a copy:

"Article of agreement made and entered into this 21st day of May, A. D. 1874, by and between Francis Schwalm, of Marble Valley, El Dorado County, State of California, party of the first and H. T. Holmes & Co., of Sacramento City and County, State aforesaid, party of the second part, witnesseth: That the party of the first part, for, and in consideration of the covenants and agreements hereinafter contained, to be kept and performed by the party of the second part, agrees to and with the said party of the second part, to manufacture for the said party of the second part, at the lime-kilns of the said party of the first part, at Marble Valley, aforesaid, and to deliver to the order of said party of the second part, at Cothrin's Station, on the cars of the Sacramento Valley Railroad Company, two thousand barrels of good, well manufactured merchantable lime, to be free from cone stone, or any foreign substances, for one year, commencing at the date of this agreement; the same to be delivered in equal quantities monthly, between the 1st day of June, 1874, and the 1st day of December, 1874. The party of the first part, further agrees to manufacture four thousand barrels of lime, if the party of the second part hereafter concludes to have the extra two thousand barrels of lime manufactured; notice to be given of such extension. The party of the first part further agrees not to sell to any person or persons any lime during the continuance of this agreement, under a forfeiture of two dollars per barrel for each and every barrel that may be sold.

"The party of the second part, in consideration of the foregoing agreement, to be kept and performed by the said party of the first part, agrees to take said lime, after delivery in the lime warehouse in Sacramento city, and to pay one dollar and twelve cents per barrel for each and every barrel of good lime, to be paid sixty days after the receipt of each kiln at Sacramento in lime warehouse.

"In witness whereof, the parties of the first and second parts have hereunto set their hands and seals the day and year above written.

"FRANCIS SCHWALM. [SEAL.]
"H. T. HOLMES & CO. [SEAL.]

"Witness: G. McMAR."

It was then averred that the defendants had performed the conditions of the agreement, but that the plaintiff had sold to divers persons, since making the agreement, one thousand barrels of lime, to the damage of the defendants in the sum of two thousand dollars, for which sum the defendants asked judgment.

The plaintiff demurred to the above defense because the contract set up was contrary to public policy, and void. The court sustained the demurrer. The defendants then amended their answer by inserting at the end of the contract, allegations, that the lime mentioned in the complaint was part and parcel of the lime contracted for by the defendants in the contract, and that the defendants were manufacturers of, and general dealers in lime in El Dorado, Placer, Sacramento and San Francisco counties, and that the plaintiff manufactured lime in El Dorado county, and had no place of business outside said county, where he sold or disposed of his lime, and that the contract only referred to such lime as should be manufactured by the plaintiff at his kiln, in El Dorado county. The cause went to trial on the amended answer, and the plaintiff proved that he had furnished the defendants with 2,342 barrels of lime, and that they had paid him $1,879.50, leaving a balance due of $755.25. The defendants then offered the contract in evidence, and offered to prove in connection therewith, all the facts set up in the amended answer. The court, on the objection of the plaintiff, refused to receive the evidence, and then gave the plaintiff judgment for the amount claimed.

The defendants appealed.

Beatty & Denson, for the appellants.

The contract is not in violation of sec. 1.673 of the civil code of the state of California. It does not purport to restrain the respondent from exercising the trade or profession of manufacturing or selling lime, but merely restricts the quantity to be manufactured within a given time, and requires that whatever is sold, shall be sold at a given price to appellants.

The respondent in the court below seemed to rely rather on the language of the code, than on the common law rule of decision in this class of cases, to sustain their views. We do not think that the code materially varies the common law rule, but is rather declaratory thereof. The common law rule is, that "an agreement in general or total restraint of trade is void." We quote from 36 Cal. 358. This is a quotation made by Mr. Justice Crockett from Story on Contracts, and by him approved as laying down the law correctly. But (Sec. 55) an agreement in partial restraint of trade, restricting it within certain reasonable limits or times, or confining it to particular persons, would, if founded upon a good and valuable consideration, be valid. This contract was limited as to time. It was entered into May 21st, and only lasted until the 1st of December following, say six months and ten days.

The cases on this subject are all cited in note of second volume of Parsons on Contracts, page 748. There seems to be perfect uniformity in the decisions on the leading points: First, an agreement in restraint of trade, when it is unlimited as to time, place and person, is void. If there is a reasonable limit as to time, place or person, and a valuable consideration for the agreement, then it becomes a binding contract.

The decisions as to limitation in territory are very numerous; those as to time and persons are not so numerous. Those as to limitation of persons are best illustrated by the case of Gale v. Reed, 8 East. 80; see also cases of Nables v. Bates, 7 Cowen, 307, and Alger v. Thatcher, 19 Pick. 51.

The language of our Code only prohibits contracts whereby one is "restrained from exercising a lawful profession." Here, the respondent was not restrained from exercising "a lawful profession." He is, on the contrary, constrained to exercise the trade of lime-making.

Armstrong & Hinkson, for the respondent.

The contract in question is in restraint of trade, and is void. The general rule laid down by the civil code upon this subject is, that "every contract by which one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void." Civil Code. Sec. 1,673.

*To appear in 49 California Reports.

There are exceptions to the general rule that contracts in restraint of trade are void, but the contract in question is not within either of them. The exceptions are as follows:

First: "One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the good-will from him carries on a like business therein." Civil Code, Sec. 1,674.

Secondly: "Partners may, upon, or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof." Civil code, Sec. 1,675.

Then, under the provisions of the Code, unless the restriction in the contract is limited to a city or county—no limitation as to time can take it out of the operation of the general rule; and we think such was the common law. There is some *dicta*, but no adjudged case to the contrary. Moore v. Bonnett, 40 Cal. 251; Wright v. Rider, 36 Cal. 357.

BY THE COURT:

The contract recited in the answer is not illegal, as being in restraint of trade. The court erred in sustaining the demurrer to the answer.

Judgment reversed and cause remanded, with directions to overrule the demurrer to the answer.

Building Railroad upon Public Highway—Rights of Adjacent Owner.*

PHILLIPS v. DUNKIRK, WARREN AND PITTSBURGH RAILROAD COMPANY.

Supreme Court of Pennsylvania, March 24, 1875.

A road was laid out as a turnpike, and used as such till 1841, when it was abandoned and adopted by the township. In 1871 the defendant railroad company built a track on this road, immediately in front of and adjacent to the plaintiff's land; and, under the act of February 19, 1849, § 13, constructed a new road in place of the one so occupied. The court below, in an action of ejectment for the road lying in front of plaintiff's land, charged the jury to find for the defendant. *Held*, (reversing the judgment, of the court below), that the plaintiff was entitled to recover, since the right to the soil of the road was in him, subject only to the right of way of the public, and, when abandoned by the latter, it revested absolutely; that the defendant, having no greater right in the premises than any other person, unless derived by grant, would be responsible for consequential damages arising from an extraordinary use of the road; and that the act of 1849 did not, on the construction by the defendant of a road in lieu of the one taken, confer on it a right to appropriate the latter.

Error to the Common Pleas of Warren county.

This was an action of ejectment by Phillips against the railroad company to recover a strip of land twenty-five feet wide, in front of his farm, occupied by the company's tracks and sidings, and formerly constituting one-half of the bed of a public highway, known as the Warren and Pine Grove Road. The language of the description in the deed under which the plaintiff claimed, dated June 14, 1872, was "north along the Warren and Pine Grove Road." The Warren and Pine Grove road was laid out in 1832 by a turnpike company, and occupied by them till 1840 or 1841, when it was adopted by the public, and kept up by the township. In August, 1871, the railroad company laid its track on this road in front of Phillips' land, and in June, 1872, constructed, in addition, a turn-table and siding; the siding running north from the main track along the road in front of the plaintiff's land, between it and the railroad, and the sweep of the turn-table passing over the plaintiff's line in turning. In the autumn of 1871, the railroad company, in accordance with the act of February 19, 1849 (§ 13), constructed another road, satisfactory to the township authorities, in place of the road occupied by their track. The old road was never formally vacated, but was practically abandoned as a township road, and the court charged the jury, in this case, "to treat it as vacated."

It did not appear that the defendant corporation had any powers, except the general one, to construct a railroad "as it may deem necessary and useful." It was proved that the defendant had not paid any compensation to the plaintiff before taking possession of the old road in front of his property.

Upon this testimony the judge below (Vincent, A. L. J.) instructed the jury to find for the defendant, on the ground that the old road never was abandoned for "public use;" and further charged that, ["when it was abandoned for use as a township road, it was only that it might be at once occupied as another public highway; that, by law, defendant had a right so to occupy it upon complying with certain duties to the public, which it is conceded it has done. The plaintiff never recovered his right to use this road as against the public, or in other words, to reduce it to private possession, and not having the right of possession as against the defendant, he can not recover in this case. We can not think the defendant was bound to provide the public with a new road at its own expense, and then pay adjoining land-owners damages for the use of land which the land-owner had then no right to occupy as against the public, the easement of the public in which had been supplied by another equally passable."]

Verdict for defendant, and judgment. The plaintiff took a writ of error, assigning for error, *inter alia*, the part of the charge in brackets.

S. P. Johnson, for plaintiff in error.

The right to the soil of a highway is in the owner of the land over which it passes. Lewis v. Jones, 1 Barr, 336; Chess v. Manowa, 3 Watts, 219; Chambers v. Furry, 1 Yeates, 167.

The owner of land bounded by a public highway owns the soil to the center line thereof. Union Burial Gr. Soc. v. Robinson, 5 Wharton, 18; Paul v. Carver, 12 Harris, 207.

The public road was practically, though informally vacated, and the fact was so treated by the court on the trial. The owner of land abutting on a highway is entitled to additional compensation when the highway is put to a different and more dangerous use. Springfield v. Conn. River R. R. Co., 4 Cush. 63; Williams v. Nat. Bridge Plank Road Co., 21 Mo. 580; Williams v. N. Y. R. R. Co., 16 N Y. 97; Presb. Soc. of Waterloo v. Auburn and Roch. R. R. Co,. 3 Hill, 567; Ridge Turnpike v. Stoever, 6 W. & S. 378; (S. C.) 2 American Railway Reports, 59.

When the company first built its road, it did not occupy the whole of the highway in front of Phillips' land; their entry a year afterwards to construct sidings was unlawful. It was not using an easement, but taking possession of the land. McClinton v. F. W. & C. R. R. Co., 16 P. F. Smith, 404.

R. Brown, for defendant in error.

The deed to Phillips was dated a year after the railroad was built, and was not on record when this action was tried. The description in the deed showed that Phillips purchased land within his designated boundaries only, and not an additional twenty-five feet then occupied by the railroad track. The rule that a conveyance of property bounded on a highway gives to the grantee a title to the soil to the central line of the highway is limited to those cases in which the grantor had title thereto at the time of conveyance. Union Burial Ground Soc. v. Robinson, 5 Wharton, 18; Cox v. Freedley, 9 Casey, 184; Paul v. Carver, 12 Harris, 207; (S. C.) 2 Casey, 223. Plaintiff's evidence below did not bring him within this rule.

The soil of a highway does not revert to those whose property abuts thereon until the highway is actually vacated in the manner provided by law.

The acts of June 13, 1836; April 14, 1846, and April 14, 1856; provide for the vacating of roads. So also the act of February 27, 1849, § 3. By the act of February 19, 1849, § 10, the defendant was granted the right to occupy sixty feet of the road. The highways are the property of the state, and she may dispose of them at will. Phila. and Montour Railroad Co. v. ——, 6 Wharton, 25.

The defendant, having constructed a road in the place of the one occupied, has a right to retain the latter. The plaintiff pur-

*From the report in 1 Weekly Notes of Cases, 633 (Phila.: Kay & Bro.)

chased after the railroad company took possession, and therefore has no right of action.

May 10. THE COURT. The land of the plaintiff was servient only to the public right of way; of the right of the soil he was never divested, but only of the surface thereof, so far as was required for the public convenience. As soon as the common road was vacated, either by legal process or by abandonment, the right to such occupancy is vested in the owner of the fee. (1 Barr, 336; 3 Watts, 219; 1 Yeates, 167.) It is certain that a private individual would have had no right, without the consent of the owner, to have occupied the land in controversy by permanent fixtures for his own use, even before the vacation of the highway. But this corporation defendant had no better right in the premises than a private person, unless such right was conferred upon it by some legislative enactment. "If it possesses the right claimed, it must be found in the power specially granted, or must result as a necessary implication from an express grant: and if it can neither be found in, nor implied from the terms of the grant, it does not exist." Plymouth Railroad Co. v. Colwell, 3 Wright, 340. Per Woodward, J. Without such grant, though the company might have the right of occupancy, yet it would be responsible for consequential damages resulting from an extraordinary use thereof. As where land had been appropriated by a turnpike company, and damages paid, and by an act of the legislature the turnpike company was authorized to sell to a railroad company, and the latter to lay rails upon the road-bed of the former, *held*, that the owners of the land were entitled to recover the damages consequent upon the construction of the railroad. Mafflin v. The Railroad Co., 4 Harris, 182.

Such being the rule of law, whence did the defendant derive its right to appropriate the land in question?

The learned court below held that this right was derived from § 13 of the act of 1849; that by supplying the common road, under the provisions of that act, it became entitled to the use of the land formerly occupied by the public, and hence owed no duty to the owner by way of compensation. We think this construction not warranted by the terms of the statute. The right of eminent domain is a very high and arbitrary one, and arises only *ex necessitate rei*, and will not be presumed to exist in a corporation unless by express legislative grant. But such presumption does not arise from the act of 1849. That act provided only for the supplying of the public with an easement in substitution of that occupied by the railroad. It deals solely with the public rights. Without this provision such occupancy of the highway could not be had. The force of the act is exhausted in putting the company in the same position as though there had been no previous public claim to the land. The insurmountable obstacle of the dominant franchise is thus removed, and the company is permitted to deal with the owner of the land as in ordinary cases. The public rights were first to be provided for by supplying a new road; when that was done, the old one was legally vacated, and the owner's right to the occupancy of his land vested *eo instanti;* that he might maintain ejectment against an intruder, whether a corporation or an individual, results as a necessary sequence of the above stated principles.

Our attention has been called to the cases of the Philadelphia and Trenton Railroad Co., 6 Wharton, 25; and Snyder v. The Penna. Railroad Co., 5 P. F. Smith, 340. But we need hardly say these are not in point; they but decide that the commonwealth may grant to a railroad company the right to use a street or road, and that, under such grant, it can not be made liable for consequential damages resulting to adjacent property holders from such use. The defendant, in the case under consideration, has failed to exhibit the grant necessary to bring it within the principles contained in the above stated cases, and has failed in the attempted analogy.

Judgment reversed, and a *venire facias de novo* awarded.

Opinion by GORDON, J., in full.

NOTE.—See Baker v. Chicago, etc., R. R. Co., 1 CENT. L. J 503, and Provost v. The Same, Ibid., 509.

Bankruptcy — Corporations — Frauds upon Stockholders—Rights of Creditor.

JOHN FARRAR v. WILLIAM R. WALKER, ASSIGNEE, Etc., AND JOSEPH T. REISTER.

United States Circuit Court, for the Eastern District of Missouri, September Term, 1875.

Before Mr. Justice MILLER.

1. **Joint Stock Corporations—Fraud on Stockholders—Voidable Contracts.**—A contract to take stock in a corporation, induced by fraudulent representations on the part of the directors and officers of the corporation is not void, but only voidable at the option of the stockholder.

2. **Bankruptcy of Corporation — Laches of Stockholder — Rights of Creditors.**—Where a person was induced by the false and fraudulent representations of the directors and officers of a corporation to take stock in the corporation two years before its bankruptcy, for which he gave in payment his note secured by deed of trust on real estate, and during that period made no enquiry as to the true condition of the corporation, but suffered his note to be held out to the public as an asset of the corporation—the lapse is too long to allow the fraud to be pleaded against the creditors of the corporation, as represented by the assignee in bankruptcy, in avoidance of the obligation expressed in the note.

3. **Certificate of Stock.**—A certificate of stock is not essential to constitute membership in a joint stock corporation.

Appeal from the United States District Court for the Eastern District of Missouri.

John Farrar, the complainant and appellant herein, brought his bill in the district court to enjoin the defendants, who are respectively the assignee in bankruptcy of the North Missouri Insurance Company, and the trustee in the deed of trust hereinafter mentioned, from selling certain realty described in the bill, and to have a certain deed of trust executed by the complainant, on said realty, for the purpose of securing his note for $1000, cancelled and set aside. Said note and deed of trust were executed and delivered on the 30th of December, 1871, by complainant to said insurance company, which was a joint stock corporation, in payment of the price of the shares of the capital stock of that company, each of the par value of $100, which complainant at that time purchased of said company. The company was on the 8th of November, 1873, adjudged bankrupt upon a creditor's petition filed on the 2d of October, 1873. The claim for the relief sought by the complainant was based on two grounds, viz:

First. On the ground of false and fraudulent representations concerning the financial condition of the company, alleged to have been made by the directors, officers and agents of the company, at and before the time when said note and deed of trust were given, whereby complainant was induced to take stock in said company, and to give the note and deed of trust aforesaid in exchange therefor, and subsequent false and fraudulent representations made by said directors, etc., whereby complainant continued to be deceived as to the true character and financial condition of the company; and

Second. On the ground that complainant received no certificate of stock, and that, consequently, the consideration for the note and deed of trust fell.

To complainant's bill, defendants interposed a demurrer, which the court below sustained, and a decree was entered dismissing the bill. From this decree complainant appealed to this court.

On the part of complainant the following points were made:

1. Fraudulent representations made by the authorized agents of a corporation, and by the company in regard to material matters, constitute a good defence to an action for the subscription to stock made on the faith of such representations.

Waldo v. Chicago R. R., 14 Wis. 375; Crump v. U. S. Mining Co., 7 Grattan (Va.) 352; Wert v. Crawfordsville Co., 19 Ind. 242; Crossman v. Penrose Ferry Co., 26 Penn. State Rep. 69; Custor v. Titusville Gas Company, 63 Id. 381; Cunningham v. Edfield & Ky. R. R. Co., 2 Head (Tenn.), 23; Sandford v. Hardy, 23 Wend. 259.

2. The questions of negligence or estoppel by some act of subscribers, have frequently been decided by the courts, and generally it is some extraneous circumstance showing acquiescence in the fraud, or a long lapse of time where the rights of others have intervened, which governs the cases where the contrary doctrine is laid down. Most of defendants' authorities are of these classes.

3. The question of completion of the contract in the bill is stated as follows: "That the company refused to deliver the stock to complainant, and never did complete the contract on their part." The assignee seeks to hold complainant to a contract never executed by the company. If the company was still doing business, complainant might compel the issue of the stock, but the assignee can not issue it. Complainant received no value or consideration for his money, and in equity ought not to be held to pay. Angell & Ames on Corporations, § 564.

4. The company could only contract by its president and secretary. 1 Wagner's Statutes, p. 764, §§ 21 and 22.

Therefore it could not be held on this contract at law. A bill in equity would have to be filed by complainant to get his stock. There is no mutuality of contract here, and complainant had a right to rescind.

5. There are cases where it has been held that absence of a stock certificate does not affect the stockholder's right to his stock, but the reason given is that the issue can be compelled. Not so in this case.

6. If complainant was guilty of *laches*, and for that reason ought to pay, it should be set up in an answer so that a reply might be had. The bill on its face does not show *laches*. Therefore the demurrer should have been overruled.

7. The assignee takes the bankrupt's estate with its burdens, and can enforce no contract that the company could not enforce, unless there are circumstances which estop complainant from setting up the fraud, such as *laches*, lapse of time, acquiescence or participation in the organization or transactions of the company, after knowing the fraud. No such state of facts exists in this case so far as the record shows. 3 Vesey, 288; 12 Vesey, 349.

For the defendants it was urged:

1. The contract between complainant and the company to take stock, was not void by reason of the fraud alleged, but voidable only at the option of the party defrauded. Oakes v. Turquand, Law Rep. 2 H. L. 325, 344, in cases there decided; Reese, etc., v. Smith, L. R. 4 H. L. 64; S. C. 2 Chan. App. 604; Upton v. Englehart, "The Chronicle" (N. Y. Ins. journal) of June 4, 1874; Clarke v. Dickson, E. B. & E. 148, and cases there cited.

2. The bill not showing any disaffirmance prior to the company's bankruptcy, of the contract to take stock, and not showing that complainant used reasonable diligence in discovering the alleged fraud, or made any enquiry whatever as to the truth of the alleged representations. or that he was not otherwise guilty of *laches*, said contract can not be avoided as against the company's creditors. Upton v. Englehart, *supra*, and cases there cited; Upton v. Hansbraugh, 10 Nat. Bk. Reg. 368; Clarke v. Dickson, *supra*.

3. The alleged misrepresentations, although they might constitute a good defence as against the company itself, constitute no defence as against the creditors of the company, represented by its assignee in bankruptcy. Ogilvie v. Knox, 22 How. 380; Upton v. Hansbraugh, *supra*; Oakes v. Turquand, *supra*; Clarke v. Dickson, *supra*.

4. It is not essential, in order to constitute a person a stockholder in a joint-stock corporation, that a certificate should be issued to him. Agricultural Bank v. Burr, 24 Maine, 256; Same v. Wilson, Ib. 275; Ellis v. Essex Merrimac Bridge Co., 2 Pick. 243; Chester Glass Co. v. Dewey, 16 Mass. 94; Hoagland v. Bell, 36 Barb. 57; Thorp v. Woodhull, 1 Sandford, 411; Commercial Bank v. Kortright, 22 Wend. 348; Angell & Ames on Corporations, 9 Ed., pp. 563, 564.

In the course of the argument, the court expressed the opinion that the want of a certificate of stock was immaterial.

Henderson & Shields, for complainant; *Wm. R. Walker*, for defendants.

MR. JUSTICE MILLER.*—This is a suit brought by the plaintiff, who was a stockholder in the North Missouri Insurance Company, to get rid of the payment of a note for $1,000, which he had given in the purchase of stock. Mr. Farrar took stock in the company, and gave this note in payment for that stock, secured by deed of trust on real estate. Two years after the giving of the note, the North Missouri Insurance Company failed, and was put in bankruptcy, and Mr. Walker was appointed assignee of the company, and being about to enforce that obligation for the benefit of the creditors, Mr. Farrar files his bill in the District Court in chancery, seeking to enjoin the sale of the mortgaged property, or rather the property conveyed by the deed of trust, which was about to be foreclosed. In that way he brings the proceeding into court to declare the note null and void, and he makes on his bill undoubtedly a case of fraudulent conduct on the part of the board of directors, or the officers of the insurance company—the whole of them—in publishing and representing to him very fraudulently and very falsely, that the insurance company was on its feet, in a prosperous condition; had a large amount of valuable assets beyond its liabilities, and that it was a good thing to take its stock; whereas he alleges that was false, and that the company was then insolvent, that these men knew it, and that he was defrauded in becoming a stockholder. We may say at the beginning, and the authorities on this point are clear, that if the corporation was still in existence, and was solvent and doing business, and suit was brought upon that instrument, Mr. Farrar could have pleaded these things in avoidance of that conveyance, and they could not have enforced it against him. But things are changed; the corporation has become bankrupt; it has no interest whatever in this conveyance, because, whether enforced or not, the corporation is dead, will not exist as an entity again, and will never receive a dollar of this money. It is now a question between the creditors of that corporation who are represented by Mr. Walker, the assignee, and a stockholder, who is indebted to the corporation for its stock, and while my first impressions were pretty strong against the idea that this liability could be enforced under such circumstances, and I was very much inclined to overrule the demurrer, and require the parties to answer and let all the facts be shown on a final hearing, due consideration has changed my mind on the subject and compels me to the conclusion that the bill must be dismissed, and that is this: That the paper as it stands, admitting the fraud and everything, is not of that class of paper which is absolutely void, but is a paper or contract, or obligation, which was voidable at the option of Mr. Farrar. He could notwithstanding the fraud, hold on to the stock and take the chances of its becoming valuable; or he could say, if he chose, "I don't think it is worth the trouble to go into a fight to avoid this obligation." In other words, it was his option to avoid that contract or stand by its legal results, and if this failure had occurred within two, three, or even four months after he took the stock and became a stockholder in the company, I should be inclined to say that he had not had a reasonable time in which to examine into the affairs of the company, and see whether he had been defrauded; and that he had still remaining his option, even after the bankruptcy of the company and the appointment of an assignee, to move to set aside that conveyance, if he could show that it was fraudulent. But the business of these corporations is so managed in this country, that justice requires, at all events, that if one of its stockholders should make this paper and obligation secured by real estate, which goes into the hands of the officers as so much assets of the corporation, and is paraded before the public as an as set

*This opinion was delivered orally and taken down by a short-hand reporter.—[Ed. C. L. J.]

and he stands up for two years and lets that note and obligation of his, secured by real estate, be counted every year, or in every semi-annual statement, that is made to the public as so much cash, which the creditors of that company may look to to cover their losses—then it is too late, the lapse is too long to allow the fraud to be pleaded. Mr. Farrar was for two years a stockholder in that corporation; he had a right to access to all its books, and to vote for its directors; it was his duty to interest himself in its management so far as to see that what it said was true; that its directors were honest; that he should use his influence to get honest men in, and yet during these two years he stands up and does nothing, makes no enquiry, no investigation. It is too late when the creditors pursue the corporation into bankruptcy, and the assignee pursues him for his note, to turn around and say, "I find out that I was swindled; I was there two years and I might have found it out and not let everybody trade on my note deposited there, but I was cheated, and I now rescind this contract." On that ground alone the bill comes too late, and the demurrer to the bill was properly sustained in the district court.

The judgment of the district court is AFFIRMED.

Grant of Right of Way in Public Street to Rail-Way Company — Compensation to Adjoining Owner.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILROAD COMPANY v. WILLIAM HARTLEY *ET AL.*

Supreme Court of Illinois, January Term, 1873.

Hon. SIDNEY BREESE, Chief Justice.
Hon. PINCKNEY H. WALKER, "
" ALFRED M. CRAIG, "
" JOHN SCHOLFIELD, "
" JOHN M. SCOTT, "
" BENJAMIN R. SHELDON, "
" WILLIAM K. MCALLISTER. } Associate Justices.

1. **Streets—When the Fee Passes to the Public.**—Where the owner of land in a town or city plats the same into lots and streets, the plat itself, under the statute, when recorded, will operate as a grant of the fee in the streets to the corporation. But when a street or highway is acquired by dedication, or *user*, the fee will remain in the original proprietor, burdened with the public easement.

2. **Right of Way—Right of State or City to grant Right of Way to Railroad Company in Street when the Fee remains in Adjoining Owner.**—Where the fee of a highway or street remains in the original proprietor, it is immaterial how the public acquired the easement over the same, whether by condemnation or by dedication. It is only for ordinary travel, such as is customary on streets and highways. In such a case the state or city authorities may grant the right to a railway company to lay its track along or across such street, but the company avails of its privilege at its peril. If, in laying its track, it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained.

3. **Same—Additional Burdens Imposed require Additional Compensation.**—Where the public have acquired an easement over a person's land for an ordinary street or highway, the location of the track of a railroad on the same is an additional burden and servitude upon the land, which will entitle the owner to additional compensation. Again, such act is an exclusive appropriation by the railroad company of the soil to its own use, which the owner had the right himself to use for any purpose not inconsistent with the prior public easement, and for that reason it is taking private property for public use, which can not be done without making just compensation.

4. **Same—In Street the Fee to which is in the Public.**—A distinction is made between cases where the municipality granting the right to lay a railroad track owns the fee in the streets, and where the fee remains in the abutting land owner. In the former case it seems that the owners of property fronting on such streets can not enjoin the laying of the track, nor receive compensation for the use of the streets so occupied.

5. **Same—Trespass.**—In this case the city authorities granted a railway company the right to construct its track diagonally across a street or highway, the fee of which was in the adjoining land owner, and it was constructed partly on his land, which he owned subject to the public easement. In its construction it lowered the street on either side some four feet to make an even grade over the railway, and thereby made it difficult of ingress and egress to and from the owner's land and residence with the street, and more difficult than before for foot-passengers. *Held*, that the company was liable to the owner in an action of trespass.

6. **Damages—Excessive—In Trespass quare clausum fregit.**—Where a railroad company constructed its track diagonally across a highway, the fee to the center of which was in the plaintiff as an adjoining land owner, and part of the track was very near to his other land and near his residence, and made a deep cut across the highway, so that they were compelled to and did lower the grade of the highway on either side of their track, for some distance, some four feet in depth, whereby ingress and egress to his property were made very difficult for carriages, and more difficult to persons on foot than before, it was *held*, that a recovery of $1800 by the plaintiff in an action of trespass was not excessive.

Appeal from the Circuit Court of McLean county, the Hon. Thomas F. Tipton, Judge, presiding.

This was an action of trespass, by William Hartley and Alley Hartley, against the appellant, for breaking and entering the close of the plaintiffs, excavating therein without their consent, and constructing and laying down thereon a railroad track, and thereafter operating the same, and by so doing permanently injuring and damaging the plaintiffs' close, and preventing the plaintiffs from the reasonable use and enjoyment of the same.

A trial was had resulting in a verdict and judgment in favor of the plaintiffs for $1,800. The other material facts of the case are stated in the opinion.

Messrs. Weldon & Benjamin, and *Mr. J. C. Black*, for the appellant; *Mr. N. W. Packard*, and *Mr. H. Spencer*, for the appellees.

MR. JUSTICE SCOTT delivered the opinion of the court.

The land upon which the alleged trespasses were committed was never platted or laid off as a part of, or of any addition to the city of Bloomington, but is within its corporate limits, and was so situated at the committing of the grievances complained of in the declaration.

Prior to the extension of the city limits, a public highway known as the "Peoria road," had been established on the south side of the premises in controversy, on the width of sixty feet, one-half being on the land now owned by appellees. After the limits of the city had been extended so as to include this tract of land, which was done some fifteen or twenty years ago, the highway over which the public had exercised jurisdiction for so many years, at that point was called Front street, being a continuation by common consent, of a street of that name to the western boundary of the city, and by dedication, or common user, it was made fourteen feet wider than the old road, but whether any portion of the fourteen feet came off the premises owned by appellees does not very clearly appear, nor is it very material. The city neither purchased nor condemned the additional number of feet added to the street. There was no ordinance formally extending Front street westward, but the city assumed and continued to exercise jurisdiction over the highway as a street, the same as other streets in the city.

Under the authority given by the city, by ordinance, to lay the track upon and across any street or alley within certain limits, appellants constructed its road diagonally across Front street, south of appellees' premises, without their consent. In constructing the road-bed appellants caused the street to be excavated to the depth of four or five feet. The track nowhere touches the land in the inclosure of appellees, but comes within six inches or a foot of it at one corner, and if they own to the centre of the old highway, then it is constructed on land the fee of which is in them.

The excavation in the street made it necessary to lower the grade in front of the premises of appellees, and in doing so the company removed a large amount of earth. This latter work appears to have been done by the company under the direction of the street commissioner, so as to have an even grade on which the public travel could more conveniently pass over the track.

The premises of appellees had previously been above the grade of what is called Front street, but the construction of the company's road across the street, and the grading that was necessary to be done to get an even grade, left them still very much higher, and rendered ingress and egress more difficult for carriages, and even for persons on foot.

It can not be successfully contested that appellees owned the fee of the land to the centre of the old highway. It was never

*From advance sheets of 67 Illinois Reports, received through the courtesy of the official Reporter, Hon. Norman L. Freeman.

conveyed to the city by any formal grant, by plat or otherwise. The adjoining proprietors never parted with the fee. Had they platted the grounds into lots and streets, under the statute the plat itself, when recorded, would have operated as a grant of the fee to the corporation. This they did not do. The city could and did acquire an interest in the street, although the grounds were never set apart for that specific purpose, in the manner prescribed in the statute. It may be by dedication or common user, and in such cases the fee would remain in the original proprietors, burdened with a public easement. Canal Trustees v. Haven, 11 Ill. 554; Hunter v. Middleton, 13 Ill. 54; Manly v. Gibson, 13 Ill. 308.

It is not questioned the city had granted appellant the necessary authority to construct its road across the street, and the principal question in the case is, whether the state and the municipal authorities combined, have the power to grant the company the right to construct its track across lands the fee of which is in appellees, without obtaining their consent, or making compensation.

On the one hand, it is insisted appellees' proprietary rights have been interfered with. The action of the company in taking possession of the lands, comes within the constitutional inhibition that private property shall not be taken for public use without just compensation. On the contrary, it is claimed that it is immaterial whether the city owns the fee of the street or not; the municipal authorities have the supreme control over all streets, and can grant the right to lay a track on or across any street, and having done so in this instance, if ingress and egress are not materially affected, it is *damnum absque injuria*.

The exact question presented has not been passed upon by this court. The authorities bearing on it are by no means harmonious. There are a class of cases that hold it is immaterial whether the municipality owns the fee in the streets or not, it may, if the legislature has conferred power for that purpose, grant a railroad company the right to construct and operate its road along or across any public street. In another class of cases the power has been confined to municipalities owning the fee of the streets.

Both classes of cases, however, rest upon the same principle, viz, a railroad is only an improved highway, and the public having the right to the exclusive use by legislative authority, may grant the use of streets for this mode of travel, although no such use was contemplated when the streets were dedicated to public use.

The decisions in this state prior to the adoption of our present constitution, are in reference to cases where the city granting the privilege owned the fee of the streets. The trespasses complained of in the case at bar, were committed prior to the adoption of our present constitution, and the right to recover is not affected by its provisions.

In Moses *et al.* v. Pittsburgh, Ft. Wayne and Chicago R. R., 21 Ill. 526, it was held, where the corporation owns the fee of the streets, and by its charter the local authorities are invested with exclusive control over them, and those authorities grant permission to locate railway tracks along a street, the owners of property fronting thereon, can not enjoin the laying of such tracks, nor receive any damage or compensation for the use of the streets so occupied.

In Murphy *v.* The City of Chicago, 29 Ill. 279, it was held to be a legitimate use of the street or highway, to allow a railroad track to be laid down in it, and for so doing the city is not liable to any damages that may accrue to individuals,

What is said in those cases is in reference to streets where the fee is in the corporation granting the privilege. No question of an ordinary highway is involved in either of them. We are not disposed to extend the principles or the reasoning of these cases any further, or apply them to cases not strictly within their meaning.

A distinction has been taken where the municipality granting the right to lay the track, owns the fee in the streets, and where the fee remains in the abutting land owner, and it seems to us that it rests on sound principle, and is supported by the highest authority.

Where the fee remains in the original proprietor, it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication; it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land, it was for no other purpose, and if it was condemned, his damages were assessed with no other view. A different use of the land from that for which it was intended can not be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense. The right of way, the road-bed and the carriages propelled thereon, are owned by private individuals, and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interests of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different and even inconsistent. The one is exclusive in favor of private interest, and the other is open and free to all.

The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner the corporation may grant the right to a railway company to lay its track along or across any street, but the company avails of its privilege at its peril. If, in laying its track, it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained.

The following cases are in harmony with our views of the law, and are conclusive of the case at bar: Presbyterian Society v. Auburn and Rochester R. R., 3 Hill, 567; Williams v. New York Central R. R, 16 N. Y. 97; Mahan v. N. Y. Central R. R. 24 N. Y. 658; Inhabitants of Springfield v. Conn. R. R., 4 Cushing, 63; Haynes v. Thomas, 7 Porter (Ind.), 39; Tate v. O and M. R. R. Co., 7 Porter, 480; Nicholson v. N. Y. and N. H. R. R. 22 Conn. 83.

Most of these cases favored the principle that the location of the track of the railroad on the highway is an additional burden and servitude upon the land, which would entitle the owner to additional compensation. Others go upon the ground that it is an exclusive appropriation by the railroad of the soil to its own use, which the owner had the right himself to use for any purpose not inconsistent with an easement in favor of the public, and for that reason have held it is taking private property for public use, and have required just compensation to be made. The cases can be maintained on either or both grounds. Neither the state nor the municipality has the power to grant away the private property of the citizen, and if corporations *quasi* public, in the exercise of the right of eminent domain, with which they are clothed by the sovereign power of the state, seek to appropriate it to their exclusive use, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value.

It is urged that the damages found by the jury are excessive. We do not think so. By reason of excavating for the track of appellant's road the grade of the street in front of the residence of appellees had to be materially lowered, so that ingress and egress by carriages from the street were rendered impracticable, and were made far more difficult for persons on foot than it had formerly been. There is no evidence that it would have been necessary to lower the grade of the street except for the location of appellant's road. The damages sustained by the appellees are marked and appreciable, and there is no reason why the judgment should not be affirmed.

The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

—ATTORNEY-GENERAL PIERREPONT, is mentioned as a possible successor of Judge Woodruff, on the Circuit Court Bench of the United States.

Negligence in drawing Cheques—Right to Recover Money paid on Raised Cheque.

THE GUARDIANS OF THE POOR OF THE HALIFAX UNION v. WHEELWRIGHT.*

English Court of Exchequer, January 20 and 21, and May 8, 1875.

1. The plaintiffs sued the defendant, their treasurer, for money received and not accounted for. The defendant made payments on orders drawn on him by the plaintiffs, and so drawn as to admit of the amounts being increased after the plaintiffs had affixed their signature. The plaintiffs claimed the difference between the amount for which they had drawn the cheques, and the amount to which they had afterwards been increased, and which larger amount the defendant had paid. *Held*, that the plaintiffs could not recover, as the orders were negligently drawn by them, and that the defendant was not responsible for the consequences of their negligence.

2. The defendant, besides being the plaintiff's treasurer, was also the manager of a bank at which the plaintiffs kept an account for their own benefit, and on which they received interest. The plaintiffs sued for certain sums paid by the defendant on orders drawn by them, but of which the indorsements had been forged without any negligence on their part. *Held*, that the plaintiffs could not recover; that the defendant, though not a banker within the bankers act, was still, on the facts of the case, not liable; that there was no receipt of money except by the bank, and that as the bankers were discharged the defendant was also discharged.

This was a special case stated by an arbitrator pursuant to a judge's order. The following are the material parts of the case:—

1. The plaintiffs are the guardians of the poor of the borough of Halifax. The defendant is their treasurer. His duties as such are defined by the consolidated orders of the poor law board, of which the following appear to be material to the decision of this case:—"Article 203. The following shall be the duties of the treasurer of the union:—(1) To receive all moneys tendered to be paid to the guardians, and to place the same to their credit. (2) To pay out of any moneys for the time being in his hands belonging to the guardians all orders for money which shall be drawn upon him in conformity with article 84, when the same shall be presented at the house or usual place of business of the treasurer, and within the usual hours of business. (3) To keep an account of all moneys received and paid to him as such treasurer, and to balance the same at Lady-day and Michaelmas in every year, and to render an account of such moneys to the guardians when required by them so to do. (4) Whenever there are not funds belonging to the guardians in his hands as treasurer of the union, to report in writing the fact of such deficiency to the commissioners. (5) To submit a proper account, together with the bonds of any officers which may be in his custody, to the auditor at the place of audit, and at the time and in such manner as may be required by the regulation of the commissioners. (6) To receive the moneys payable to him as treasurer of the union under any act of parliament or any other authority of law.—Article 84. The guardians shall pay every sum greater than £5 by an order which shall be drawn upon the treasurer of the union, and shall be signed by the presiding chairman and two other guardians at a meeting, and shall be countersigned by the clerk.

2. The defendant is, and at the time of his appointment in August, 1867, was known to the guardians to be, the salaried manager of the Halifax Commercial Bank, and it appeared from an entry in the minute-book of the guardians that he was appointed treasurer because a majority of the guardians considered it desirable that the treasurer should be a bank manager.

3. The course of business between the plaintiffs and the defendant was as follows:—Sums of money were from time to time paid to the account of the plaintiffs across the bank counter to the bank clerks, and the orders signed on behalf of the plaintiffs were cashed like cheques payable to order.

4. When the defendant was first appointed treasurer the plaintiffs' account was kept in a common pass-book headed, "Guardians of Halifax Poor Law Union in account with the Halifax Commercial Banking Company (Limited)." The account was afterwards kept in a treasurer's book according to the form prescribed by the Consolidated Orders of the Poor Law Board, p. 542.

5. No express remuneration or salary was assigned to the defendant as treasurer.

6. Article 174 of the Consolidated Orders of the Poor Law Board is as follows: "If no remuneration or salary be assigned to the treasurer, the profit arising from the use of the money from time to time left in his hands shall be deemed to be the payment of his services."

7. The defendant never received any profit from the use of the money left in his hands, and the sums deposited by the plaintiffs were dealt with by the bank in every respect in the same manner as sums deposited with them by other customers, and it was understood that when the balance to the credit of the guardians exceeded £3,000 they should be allowed interest in respect of it by the Halifax Commercial Bank. During the period of the transactions hereinafter mentioned they were on several occasions credited with sums of money as interest, which were entered in the treasurer's book as payments to their credit by the Halifax Commercial Bank.

The orders drawn by the guardians were upon forms drawn to order addressed to the defendant, as treasurer of the guardians of the poor of the Halifax Union, and signed by the presiding chairman and two other gaurdians of the poor of the union, and countersigned by the clerk to the board of guardians.

8. They were in every case signed and countersigned in the manner required by section 84 of the Consolidated Orders of the Poor Law Board.

9. Charles Barstow was clerk to the board of guardians, and he had in his employment a clerk named Laidler. It was the duty of Laidler to fill up the orders for the signatures of the guardians, so that, when filled up, the whole of the writing and figures on them, with the exception of the signature of the guardians and the counter-signature of Barstow, was in Laidler's handwriting. Laidler drew a large number of orders in such a manner as to enable himself to increase the amount after they had been duly signed and countersigned. He did increase them accordingly by various sums, in most instances by £10, the syllable "teen" being added after the written words four, six, seven, eight, or nine, in spaces left by Laidler for the purpose. In some cases a larger sum, as twenty or thirty, was written before a smaller sum and corresponding figures before the figures.

11. Laidler also found means to obtain the indorsements of the payees to a large number of these orders. No evidence was given as to the exact means by which this was affected, but it appeared probable that the amounts were increased after the indorsements were obtained.

12. The orders thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and I find that the payment by the treasurer's clerks of the excess in these instances was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk in signing the orders fraudulently prepared by Laidler for their signature.

13. In other cases, the orders not being tampered with, Laidler forged the indorsements of the payees, and so obtained the amount for which the orders were drawn. The total amount of such orders was £287 9s. 5d.

14. In other cases Laidler both increased the amount for which the orders were drawn in the manner already stated, and forged the indorsements of the payees. He then presented the order and obtained the full amount to which the cheques had been altered. The amount for which these orders were originally drawn was £82 12s. 4d. The amount to which they were altered was £273 12s. 4d., the fraudulent additions amounting to £191. Laidler was enabled in every case to make the fraudulent additions to the amounts for which these cheques were drawn by a want of caution on the part of the guardians similiar to that above referred to.

*From the Report in 23 Weekly Reporter, 704.

15. The guardians of Halifax Union brought an action against their clerk, Barstow (a copy of the pleadings and particulars in which was annexed to, and was to be taken as part of, the case). This action was settled upon the terms stated in a paper, which was, as far as is material, as follows: "Between the guardians of Halifax Union, plaintiffs, and Charles Barstow, defendant. Memorandum of the terms of settlement in this action. The defendant to consent to a judge's order for staying proceedings on payment to the plaintiffs of £2,320 4s. 6d., the amount of certain of the orders or cheques enumerated in the particulars of the plaintiff's demand in this action. This sum to be accepted in full discharge of all claims, demands and liabilities in this action, or otherwise, against the defendant as clerk to the board."

16. The particulars delivered in the case of The Halifax Guardians v. Wheelwright, claimed £2,379 9s. 5d. in respect of the different classes of orders above referred to. Thirty-five of these orders, on which an amount of £1,302 had been fraudulently obtained, were orders payable to Barstow. The particulars in the action of The Halifax Guardians v. Barstow, claimed in all £3,681 17s. 5d. All the orders enumerated in the particulars in the action against Wheelwright were included in the particulars in the action against Barstow. The plaintiffs in the present action gave the defendant credit for £1,302, being the amount by which the thirty-five orders payable to Barstow had been fraudulently increased, as they considered that the compromise with Barstow deprived them of the moral, though not as they said of the legal, right to recover upon them.

The defendant contended, first, that the compromise with Barstow extinguished the claim of the plaintiffs to recover in respect of any of the items specified in the particulars of this action, and secondly, that as to the sum of £287 9s. 5d. the defendant was within the provisions of the 16 and 17 Vict. c. 59, s. 19, and as to the sum of £273 9s. 4d. he was liable to no part of it, or at all events only for the amount of £82 12s. 4d., being the amount for which the orders were originally drawn.

17. The questions for the court are as follows:

(1) Does the settlement in the action of The Halifax Guardians v. Barstow prevent the plaintiffs recovering against the defendant in this action? If this question is answered in the affirmative, then a verdict for the defendant is to be entered in the action of Halifax Guardians v. Wheelwright, and I direct that a plea be taken to have been added, setting up this defence, that the plaintiff be taken to have demurred thereto, and that judgment in the demurrer be deemed to have been given for the defendant.

If this does not so operate, then (2) are the plaintiffs entitled to recover from the defendant any and which of the following sums:—the sum of £287 9s. 5d., being the amount of the cheques of which Laidler forged the endorsements; the sum of £273 12s. 4d., being the total amount of the cheques of which Laidler both increased the amounts and forged the indorsements?

Or in case the court should be of opinion that the plaintiffs are not entitled to recover the whole of the last-mentioned sum, then are they entitled to recover the sum of £82 12s. 4d., being the amount for which such last-mentioned orders were originally drawn, or the sum of £191, being the amount of the fraudulent additions to such orders?

If the plaintiffs are entitled to recover any one or more of these sums, a verdict is to be entered for the plaintiffs for the amount.

If the plaintiffs are not entitled to recover any of these sums, a verdict is to be entered for the defendant.

Jan. 20.— *Field, Q.C.* (*Gibbons* with him), for the plaintiffs.—The first question is, whether anything in the way of a compromise has taken place. Has the compromise with Barstow any effect? King v. Hoare, 13 M. & W. 494, and Brinsmead v. Harrison, 20 W. R. 784, L. R. 7 C. P. 547, will be relied on by the defendants; but in those cases there was a joint tort. Now here there is no join tort; the duties were independent, and the torts are independent. As to the sum of £287 9s. 5d. the defendant claims the protection of the Bankers Act (16 and 17 Vict. c. 53, s. 19), which provides "that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and that it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the sanction or authority of the person to whom the said draft or order was or is made payable either by the drawer or indorser thereof." The provisions of this section can not protect the defendant. The arbitrator has found that the plaintiffs were not negligent, and that their conduct did not conduce to the forgery. The defendant is not a banker within the statute. The plaintiffs are a corporation; they are forced to employ certain officers, the treasurer amongst others; the relation, therefore, between the plaintiffs and the defendant is that of master and servant or principal and agent. The treasurer's duties are clearly defined by the orders, and he is not thereby made a banker; he is merely a salaried servant of the bank as well as the plaintiffs' treasurer, and the section does not protect him: Ogden v. Benas, 22 W. R. 805, L. R. 9 C. P. 513. The sum of £191 is the third item. Paragraph 14 of of the case deals with this, and the facts as found do not debar the plaintiffs from recovering this sum. The principle is clear: a customer has money at his bankers; no authority is given them to pay it; they pay it, however, on a supposed authority; no negligence is proved on the customer's part. Even if there were a want of caution, that is not negligence. He cited also the following cases: Hall v. Fuller, 5 B. & C. 750; Young v. Grote, 12 Moore, 484, 4 Bing. 252; Scholey v. Ramsbottom, 2 Campbell, 485; Robarts v. Tucker, 16 Q. B. 560; The Governors of the Bank of Ireland v. Evans, 5 H. L. 389. [CLEASBY, B., referred to Coles v. Bank of England, 10 Ad. & Ell. 437.] Swan v. The North British Australian Company, 11 W. R. 862, 2 H. & C. 175.

Wills Q.C. (*Mellor* with him), for the defendant.—As to the third point it is submitted that the customer must suffer for his own want of caution. In this case the handwriting was the same throughout the cheque; the bankers could not discover any alteration. In Hall v. Fuller, 5 B. & C. 750, the customer was not in fault; there a chemical process was used. In Young v. Grote, 12 Moore, 484, it was conceded that the cheque was good, but the difference was between what the plaintiff's wife put and what the forger inserted. Drawing a cheque is giving authority to the banker. [POLLOCK, B.—May there not be estoppel by negligence as well as by authority?] There is an implied contract that the customer should use proper care: *Ex parte* Swan, 7 C. B. N. S. 400; Swan v The North British Australian Company, 11 W. R. 862, 2 H. & C. 175; Orr v. Union Bank, 1 Macq. H. L. 513. Secondly, the Bankers Act does not protect the defendant. Doubtless the words of the section apply to bankers only, and not to persons acting as bankers. But the defendant was really a banker. On the facts of this case any jury would have found that the bank was the principal; *quoad* the plaintiffs, the defendant must be taken to be a banker. The tort here is one to which both contributed. This transaction could not have been complete without the acts of both. The plaintiffs can not alter the substance of the matter. It is admitted that if the tort is joint, the judgment against one would settle the action against both: Brinsmead v. Harrison, 20 W. R. 784, L. R. 7 C. P. 547. The compromise with Barstow applies to every item in the particulars, and every item against the defendant is included in the compromise.

Cur. adv. vult.

May 8.—CLEASBY, B., delivered the judgment of the court:*—The question in this case is whether the defendant, who was the treasurer of the plaintiffs, is liable to them for moneys received

* Cleasby, Pollock, and Amphlett, BB.

and not accounted for. This question arises upon two items. These two items are, first, £273 12s. 4d., composed of two amounts of £191 and £82 12s. 4d.; and secondly, £287 9s. 5d. The question on the first item is whether the defendant can claim the credit of payments made by him upon orders which had been signed by the plaintiffs, but which had become forgeries by the amounts being increased. Under ordinary circumstances he could not claim the benefit of those payments; but it was said the forgeries were attributable to the negligent and improper manner in which the drafts were drawn.

The alleged negligence was the leaving blanks in the drafts, which admitted the insertion of increased amounts by the person who wrote them and who committed the forgeries. Since they were signed by and on behalf of the plaintiffs in the improper form in which they had been drawn, the case is the same as if they had drawn them in their proper form, and the plaintiffs can not, we think, avail themselves of the fact that the drafts were not drawn by themselves, but by some person in the office of their clerk. We have upon the consequences of the negligent drawing of the drafts the following statement in paragraph 12 of the case. "The orders thus fraudulently increased in amount, but genuine in all other respects, were presented and paid at the bank in the ordinary way, and a find that the payment by the treasurer's clerks of the excess in these instances, was due solely to the fact that they were misled by want of proper caution on the part of the guardians and their clerk, in signing the orders fraudulently prepared by Laidler for their signature." The question, therefore, which arises upon this item is, whether the negligent drawing of the drafts disentitles them to complain of the cashing of those drafts. Upon this question we had before us the principle case of Young v. Grote, 12 Moo. 484, 4 Bing. 252, followed by several others; Robarts v. Tucker, 16 Q. B. 563; Swan v. The North British Australian Company, 10 W. R. 841, 7 H. & N. 603. We think the position taken by the defendant is made good by those authorities. It is true that there is some difference of opinion as to the proper legal ground for the conclusion, and perhaps, some difficulty in determining which is the soundest. It is put on the ground of the negligence itself disentitling the party guilty of it in one cited case, when the fault is said to be all on one side, and when the conclusion is justified, in the judgment of Chief Justice Best, by an apposite quotation from Pothier. In the case of Robarts v. Tucker, 16 Q. B. 578, upon error, Mr. Baron Parke, in no way impeaching the judgment in Young v. Grote, considered that it was founded on this, that the person who negligently drew the checque, as it were, gave authority to the party to fill up the checque in the way it was filled up. In the last cited case, Swan v. The North British Australian Company, 11 W. R. 862, 2 H. & C. 175, the present Lord Chief Justice of the Queen's Bench preferred putting the conclusion upon the ground of avoiding curcuity of action, which is certainly the most exact ground, and agrees with what is said by Pothier in the passage referred to. But these various reasons for the conclusion only show how incontestable the conclusion itself is, and it is, perhaps, only an application of those general principles which do not belong to the municipal law of any particular country, but which we can not help giving effect to in the administration of justice, viz., a man can not take advantage of his own wrong, and a man can not complain of the consequences of his own default against a person who was misled by that default, and not through any fault of his own. So far, then, as regards this item of £273 12s. 4d., we think the plaintiffs can not recover.

As to the other item of £287 9s. 5d., the question raised is one of some difficulty, and we thought proper to take time to consider it. This may be taken to be the amount of the orders which were paid upon the forged endorsements, and the negligent drawing of these orders does not apply to it at all. The question raised is whether under the circumstances of the case, the defendant can claim the protection given to the bankers by the statute 16,17 Vict. c. 59, s. 19. Previous to that statute, if a banker paid a checque with a forged endorsement upon it, he could not charge it against his customer, but the effect of that statute was to enable him to do so. Two arguments were addressed to us upon this part of the case. First it was said, taking that statute together with several other statutes on the same subject, the word "bankers," was not to be restricted to persons regularly engaged in the business of banking, but that any person who received the money of another into his charge, and, according to the course of business between them, pays it out by honoring drafts drawn upon him, payable to order, ought to be considered a banker within the enactment. We can not agree to that argument. We think the legislation had reference to a particular class—that is, to persons carrying on the business of bankers — and conferred on them a great privilege. Such a privilege can only be claimed if it has been conferred in the clearest language. A confidence might well be placed in the integrity and character of persons carrying on the ordinary business of bankers which would not belong to any other person entrusted with money. The other ground taken deserves more consideration. It was contended that all the facts of the case taken together showed that the account of the guardians ought to be regarded as a bankers' account kept by them with the Halifax Bank. The manner in which the orders were drawn as stated in paragraph 8 of the case, not being drawn on the bank but on the treasurer, who was manager of the bank, was relied on, and no doubt with some reason, to show that there was not a banking account between the guardians and the bank. And if there was no other evidence on this part of the case it would be conclusive. But it appears from paragraph 3 that the course of the business was for money to be paid to the credit of the plaintiffs across the counter. It further appears from paragraph 4 that for some time the plaintiff's account was kept in a pass book in the useual manner, and that afterwards it was kept in a treasurer's book in the prescribed form. It seems clear that until the change the bankers were the bankers of the plaintiffs, and though the statement is not very full still it is clear that the change was not for the purpose of altering the relation between the defendant, the plaintiffs, and the bank, but to comply with the rules as regards the treasurer. This conclusion, moreover, is fully warranted by the statement in paragraph 7, from which it appears that unquestionably in point of fact the guardians had for their own benefit an account of some sort with the bank, and the money was by consent of both parties regarded as theirs, and the plaintiffs received considerable sums of money from the bank as interest for their money; it was, therefore, a banker's account. But it was forcibly argued that according to the poor law regulations this could not be. The guardians are to pay to the treasurer, and the treasurer ought to have had his own account with the bankers. The answer to this seems to be that the guardians chose to make use of the manager as treasurer, and in that way to have the benefit of an account with the bank. We must, upon the question before us, deal with the facts as they are, not as they ought to have been. It follows that the plaintiffs, having chosen to keep and have the benefit of a banker's account, must take it with its incidents, and one of those is that the payment of a genuine cheque with a forged endorsement is a discharge.

It may be said that although the bankers are discharged as against the plaintiffs, still the treasurer is not, as he has bound himself to account for what he receives. But the answer to that seems to be that there was, in consequence of the manner in which the plaintiffs, who were the masters, chose to have the account kept, no receipt except by the bankers, and the defendant could not help himself; he can only, therefore, be regarded as receiving subject to the consequences of the manner of receiving. It may, also, further be said that if the account must be regarded as the account of the treasurer with the bank, still it was so kept by him by the plaintiff's order, and they ought not to make a claim which he could not have enforced against the bank. The case is one of

difficulty in consequence of the parties having departed from the proper course; but we think that the proper conclusion is, that as the only receipt by the defendant was the receipt by the bankers, under the circumstances stated in the case he can not rightly be held liable when they, without any act or default on his part, are discharged. JUDGMENT FOR THE DEFENDANT.

Attorneys for the plaintiffs, *Le Riche & Son.*

Attorneys for the defendant, *Jacobs & North.*

NOTE.—See Nat. Bank v. Allen, *ante*, 612.

Notes and Queries.

STATUTE OF LIMITATIONS—PART PAYMENT—SURETY.

LIBERTY, MO., Oct. 9, 1875.

EDITORS CENTRAL LAW JOURNAL:—Refer your correspondent from Vandalia, Ill. (*ante*, p. 647), also to Hunt v. Bridgman, 2 Pick. 581; White v. Hale, 3 Pick. 291; Cady v. Shepherd, 11 Pick. 400; Hopkins v. Banks, 7 Cow 650; Lawrence Co. v. Dunkel, 35 Mo. 395; Craig v. Callaway Co., 12 Mo. 94; McClurg, *et al.* v. Howard, 45 Mo. 365. S. H.

Briefs.

[Our object in noticing briefs is to enable our readers to assist each other by a gratuitous exchange of briefs. Any brief here referred to can be had by addressing the attorney who prepared it.]

Forcing a Railroad into hands of a Receiver.—County of Livingston, Missouri, v. St. Louis, Council Bluffs and Omaha R. R., in the circuit court of said county, p. 15. Plaintiff took certain stock in said road, upon condition that the road would be built to a given point, which extension the defendant has failed to make. Whereupon a petition was filed for an order of court to put the railroad in the hands of a receiver, to further the performance of the contract on the part of defendant. Argument is in favor of plaintiff. [Address Messrs. Low & McDougal, Hamilton, Mo.]

Ejectment—Saline Lands.—J. S. Morton *et al.* v. J. T. Green *et al.*, Supreme Court of United States. Argument for defendant, pp. 22, appeal from Supreme Court of Nebraska. The question at issue seems to be, whether certain lands claimed by plaintiffs, were properly obtained by them under a military bounty land warrant, issued under act of Congress, 11th of Feb'y, 1847, (by causing them to appear as ordinary lands), or were they, because of being saline lands, reserved by Congress from the grant made to Nebraska in 1854. [Address R. H. Bradford, Esq., Washington, D. C.]

Ejectment—Judicial Sale.—W. C. Clark, *et al.*, apps. v. J. R. Bayley, respnd. In the Supreme Court of Oregon. Argument for respondent, pp. 8. This was a case in chancery, and involved consideration of equity rulings, equitable estoppel, and judicial sales. [Address R. S. Strahan, Esq., Corvallis, Oregon.]

Liability of Corporation for Acts of Agent.—Opinion and argument by Messrs. Randolph, Singleton and Browne, on behalf of the New Orleans Mutual Ins. Association, on suits brought against the association by the holders of drafts drawn by its secretary on Seignouret Frères, Bordeaux, France. It seems that the corporation referred to, was chartered solely to do the business common to insurance companies, and was especially prohibited from doing a general mercantile business. Nevertheless, said corporation did engage to a certain extent in banking, and the suits in question were on certain bills of exchange drawn by said corporation as a banking institution. Among the topics discussed are, how a corporation may bind itself; how corporations are created; how they may contract; acts beyond the scope of a corporation's charter; estoppel; power of a president and secretary to bind a corporation; and many others of like nature. This argument is elaborate and masterly and worthy of careful study. [Address the authors at New Orleans, La.]

Respondeat Superior—Railway Negligence.—Mary Durkin, Adm'x. of Lawrence Durkin, v. T. W. and W. R. W. Co. In the Supreme Court of Illinois. Brief for defendant, pp. 4. A train on defendant's road ran into some cattle, thus throwing a car from the track and killing Lawrence Durkin. The opinion of Judge Breese of the Supreme Court is also given, in favor of defendant. [Address G. B. Burnett, Esq., St. Louis.]

Easement of Way.—Dillmann *et al* v. Hoffman. In the Supreme Court of Wisconsin. Brief for Dillmann, respondent, pp. 14. Case not stated. Authorities cited are numerous. [Address Messrs. Smith & Stark, Milwaukee, Wis.]

Right of Railroad to lay Track on Street.—H. & T. C. R. R. Co. v. B. M. Odom. In the Supreme Court of Texas. Brief for the railway, pp. 32. The plaintiff laid its track along a street which defendant claimed to own, thereby damaging defendant's property. The railway company seems to have interpreted the terms of its charter generously. [Address Messrs. Hancock, West & North, Austin, Texas.]

Indemnity Bond.—Vogel v. Melrus. Supreme Court of Wisconsin. Argument for Melrus, pp. 10. The question, though not stated, seems to be whether two parties were alike bound by the same promise, or not. [Address Messrs. Smith & Stark, Milwaukee, Wis.]

Homestead—Mortgage—Administration.—Cannon, Adm'r, and Decherd, Widow, v. Bonner, trustee. Supreme Court of Texas. Argument for plaintiffs. Suit for the recovery of certain lands, claimed as a homestead, for which mortgage and notes had been given. It is sought to make the notes stand as an independent contract, and to set aside mortgage because mortgagor's wife did not sign it. [Address T. T. Gammage, Esq., Palestine, Texas.]

Commissions of Land Agents.—William Love *et al.* v. Scott Miller *et al.* Argument for appellees, pp. 19. In the Supreme Court of Indiana. Defendants contracted to pay plaintiffs a commission for selling certain land, which it is claimed was not sold by plaintiffs, though they ask for the commission. [Address Messrs. Smith & Hawkins, Indianapolis, Indiana.]

Sale of Stock by a Stock Board.—W. W. Baldwin *et al.* v. State of Kentucky. In the Supreme Court of that State. Brief for defendant, pp. 19. The state held certain stock in several railroads, which stock a board of commissioners were authorized to offer for sale. They did so, and plaintiff entered into negotiations for their purchase, but did not buy. Finally, the legislature asked the board not to sell. The state brought action against the railroads for dividends, and plaintiff, interpleading, claimed to own the stock, and asked to have the state turn it over to him. It is urged that the plaintiff could not sue without authority from the state legislature. [Address, T. F. Hargis, Esq., Frankfort, Ky.]

The Lutheran Church Independent in Form.—Trustees of Zion's Lutheran Church of Lima, O., v. The Rev. A. S. Bartholomew *et al.* In the District Court of Allen County, Ohio. Argument for defendants, pp. 44. This brief holds that the Lutheran Church has an independent form of church polity. [Address, I. Pillars, Esq., Lima, Ohio.]

Liability of Barkeepers for Selling Liquor by which one becomes Habitual Drunkard.—William Roth, appellant, v. Mary Eppy, appellee. In the Supreme Court of Illinois. Brief for appellant, pp. 49. Mary Eppy brought action, under the 5th section of act of 1872, against Roth, for selling liquor to her husband, whereby he became an habitual drunkard and lost his reason. [Address, Messrs. Puterbaugh, Lee and Quinn, Peoria, Illinois.]

Recent Reports.

REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE STATE OF FLORIDA. Reported by WM. ARCHER COCKE, Attorney-General. Volume XV., No. 1. Tallahassee: Floridian Office. 1875.

We have in this modest looking, paper-covered volume, an example of promptness in the publication of reported decisions, well worthy of imitation by the majority of state reporters. The volume before us, which is intended to comprise about one half of the fifteenth volume of reports when complete, contains the cases decided at the October term, 1874, and the January and June terms, 1875. We do not remember a like instance of despatch in the publication of state reports. The fact that the Florida reports are always published in parts, never being bound into complete volumes by the state, makes little difference. If Judge Cocke, the able and honored attorney-general of the state, whose official duty it is to report the decisions of the supreme Court, can, among the multitude of his other official and literary engagements, accomplish so desirable a purpose, it seems difficult to perceive any good reason why an equal degree of promptness should not be attainable at least by those reporters whose sole business it is to perform the same duty. This portion of Vol. 15, contains over 450 pages, and reports 27 cases. The paper and press-work are none of the best, but probably the best the reporter could secure in the state. A minute of the proceedings of a meeting of the bar, held for the purpose of paying a tribute of respect to the memory of Hon. MARIANO D. PAPY, a distinguished member of the bar, and former Attorney-General and Reporter, appears in the volume.

The Supreme Court of Florida, as now constituted, is one of the best in the South, and its reported decisions can not fail to take a prominent place among the reports. We have space to notice only a few of the cases reported.

United States Direct Tax—Certificate—Evidence—Assignment. Billings v. McDermott, p. 60. Opinion by Randall, C. J. The certificate of the sale of lands by the direct tax commissioners, under the act of Congress of June 7, 1862, is only *prima facie* evidence of the regularity and validity of the sale and of the title of the purchaser; and an assignment of the certificate, does not divest the purchaser of his title, nor give the assignee a right of action in ejectment in his own name.

Dower—Right of, in Land sold before Marriage.—Rain v. Roper, p. 121. Opinion by Randall, C. J. The right of dower in real estate which

the deceased husband contracted to sell before marriage, depends on compliance by the purchaser with the terms of the contract. If he pays the purchase money contracted for, he is entitled to a deed free from dower. If the contract be rescinded, the widow will be entitled to dower.

Dower—Relinquishment of—Consideration for Settlement.—Nalle & Co. v. Lively, p. 130. Opinion by Fraser, J. A relinquishment of dower by wife for benefit of husband is a sufficient consideration to support a subsequent settlement, and such is not fraudulent.

Judge—Disqualification.—State of Florida *et al.* v. Jacksonville, etc., R. R., p. 201. Opinion by Westcott, J. Attorney of third person, not a party to suit, in proceedings against a receiver in the suit is not disqualified from sitting as judge to hear the case, when the equities are independent of the rights of his client.

Injunction—Appeal.—Ibid. A defendant can not, by injunction, be prevented from appealing, when he has a clear right to appeal; nor should perpetual injunction be granted which in effect determines rights involved in the issues of the cause.

Receiver—In Prior and Subsequent Suits.—Ibid. The general rule is that a receiver, appointed in a prior suit should not be displaced by the appointment of a receiver of the same subject-matter, in a subsequent suit, but the receivership in the first should extend to the second. If such subsequent receiver be appointed, however, the first receiver should deliver to the second.

Appointment of Receiver—Notice—Of Mortgaged Property.—Ibid. Notice, except in extreme cases of urgency, should always be given of application for appointment of receiver. Where the subject-matter is mortgaged property, the mortgagee is not entitled to have a receiver appointed as to the other property not included in the mortgage.

Direct Tax Commissioners—Effect of Acts of.—Billings v. Stark, p. 297. Opinion by Randall, C. J. Neglect or refusal of one of three forming a board of United States Direct Tax Commissioners, or his dissent from proceedings of the majority of the board, will not invalidate the act of the majority. A tax sale certificate signed by two of the commissioners is "*prima facie* evidence of the regularity and validity of that sale, and of the title of the purchaser."

Direct Tax Sale—Officers of Treasury Department—Powers of.—Ibid. There is no power vested by law in the officers of the treasury department to set aside a sale, or vacate a title acquired by a purchaser at a sale for direct taxes.

Evidence—Title of Former Owner as against Purchaser at Direct Tax Sale.—Ibid. Evidence by claimant of former owner's good title, and deed from him, is no defence to the title acquired by purchaser at direct tax sale.

Mandamus.—State of Florida *ex rel.* v. Hon. W. W. Van Ness, p. 317. Opinion by Westcott, J. Mandamus does not lie to compel a judge to hear a cause in which he has determined himself to be disqualified.

Collection of Taxes—Set-off.—Finnigan v. City of Fernandina, p. 379. Opinion by Westcott, J. Equity will not interpose to enjoin collection of taxes because the municipal corporation to which they are due is indebted to the delinquent tax-payer, nor on account of irregularities in the manner of notice of time and place of sale. Taxes are not subject to set-off.

Tenant in Common—Crop.—Bird v. Bird, p. 424. Opinion by Westcott, J. Crops grown by one tenant in common, on the common estate, belong absolutely to him; other co-tenants have no property in them. The relation of landlord and tenant does not exist between them. See Bird v. Earle and Perkins, p. 447. C. A. C.

Summary of Our Legal Exchanges.

AMERICAN LAW TIMES AND REPORTS, OCTOBER.*

Criminal Law—Insanity in Murder Cases—Evidence to Establish—Competency of Juror who Entertains Unsettled Opinion.—Ortwein v. Commonwealth, Supreme Court of Pennsylvania. [2 Am. L. T Rep. (N. S.) 435; S. C., 76, Penn. State.] Opinion by Agnew, Ch. J. 1. Under sect. 66 of act of 31st March, 1860 (Criminal Code), the jury, before finding the fact of insanity specially, must be satisfied of it by the evidence. 2. A reasonable doubt of the fact of insanity in a criminal case, is not a true basis for the finding of it as a fact, and as a ground of acquittal. 3. The evidence to establish insanity as a defence in a criminal case, must be satisfactory, not merely doubtful. 4. A person charged with a crime must be judged to be a reasonable being, until a want of reason positively appears. 5. To make a want of reason appear, the evidence must be satisfactory, not merely doubtful; nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature. 6. Insanity, as a defence, must be so great as to have controlled the will, and taken away the freedom of moral action. 7. When the killing is admitted, and insanity is alleged as an excuse, the defendant must satisfy the jury that insanity actually existed at the time of the act; a doubt as to the insanity will not justify the jury in acquitting. 8. Where a juror had formed his opinion in part from testimony taken before the coroner, as read in the newspapers, and part from rumor, but his opinion was so unfixed that he could hear and determine the case from evidence given on the trial, uninfluenced by previous impressions, he was not incompetent. 9. The enquiry as to the juror's incompetency from previous opinion is, whether his opinionis a pre-judgment, with such fixedness and strength as would propably influence and control his judgment, or formed upon the same evidence as will be given on the trial. 10. Evidence before a coroner has not the same weight as that given on the trial.

When and how Deed, Absolute on its Face, may be shown to be a Mortgage.—Plumer v. Guthrie. Mr. Justice Mercur gave the opinion. [2 Am. L. J. Rep. (N. S.) 446; S. C., 76 Penn. St.]. 1. To show by parol that a deed absolute on its face is a mortgage, the proof must be clear, explicit, and unequivocal. 2. The proof must establish an agreement substantially contemporaneous with the execution and delivery of the deed, and not rest on the subsequent admission and declarations of the mortgagee only. 3. Guthrie's land was sold at sheriff's sale, purchased by Lane, a creditor; he conveyed to Plumer. Evidence of conversations between Lane and Guthrie, months before the conveyance to Plumer and not in his presence, tending to show an understanding that Plumer would advance Guthrie's debt to Lane, and take the property as security for Guthrie, *held* to be admissible. 4. To convert an absolute deed into a mortgage, the contract to do so need not be express, it may be inferred from facts and circumstances; but a knowledge of these must be brought home to the owner of the legal title before he can be affected by them. 5. Evidence of such facts and circumstances should be received with caution, and if it does not make a case on which a chancellor would decree a conveyance, should not be submitted to the jury. 6. Eleven years after the conveyance to Plumer he made a lease of the land to Guthrie, who took possession under it. If the original conveyance to Plumer was a mortgage, the lease was evidence of Guthrie's abandonment of it. 7. Evidence in this case not sufficient to submit to a jury on the question whether the deed was a mortgage.

Contract by Carrier to Make Collection of Promissory Note Beyond its Terminus—Custom—Damages.—Knapp v. The U. S. & Canada Express Co. Opinion by Foster, Ch. J. [2 Am. L. T. Rep. 476; S. C., 55 N. H.] The plaintiffs gave to the agent of the defendants, an express company, a promissory note, telling him they wanted him to send it by express for collection upon the makers at H. The agent took the note, saying he would send it. The defendants' line did not extend to H., but their practice was to deliver packages and demands for collection going beyond the terminus of their own route to R. & Co.'s Express at L. Between R. & Co., and the defendants there was no business connection, nor any division of profits or compensation for carriage or collections; but, with respect to demands for collection received by R. & Co. from the defendants, R. & Co. reported to the genera agent of the defendants in Boston and followed his directions. *Held*, these facts did not, as a matter of law, impose any obligation upon the defendants with regard to the collection of the note after its delivery to R. & Co.; but they were evidence of a contract on the part of the defendants to do with the note according to their custom and usage with respect to business of that description, even though a part of that undertaking was to be carried out at a point beyond their line, and by agents not in their immediate employ. Where the defendants' agents were accustomed to receive notes for collection in the circumstances above recited, *held*, the defendants were estopped to deny that such agents were authorized to make contracts on behalf of the company to transact business of such character beyond the limits of the defendants' route. The makers of the note had property sufficient to pay the same when the defendants received it for collection; but by reason of the defendants' negligence with regard to its collection, the note became worthless upon the failure of the makers of the note. *Held*, the damages were the amount of the note and interest.

Railroad—Freight Train—Refusal to carry Passenger—Damages.—Ill. Central Railroad Co. v. Johnson. [2 Am, L. T. Rep. 433; S. C., 67 Ill.] Opinion by Scott, J. 1. A railroad company has the clear right to make a rule that no one shall be carried as a passenger on its freight trains. But when it is in the habit of carrying passengers on such a train, and has its regular hour for departure posted in its office at the station, it will not be justified in refusing to carry a passenger from such station, or in putting him off of such train. 2. Where a railroad company adopts a rule prohibiting passengers from being carried on its trains, or on its freight trains, without the pur-

*New York: Hurd and Houghton.

chase of tickets, it must furnish convenient facilities to the public by keeping open the ticket office a reasonable time in advance of the hour fixed by its time-table for the departure of the train. Should it fail to do so, a person desiring to take passage will have the right to enter the car and be carried to his place of destination, on payment of the regular fare to the conductor. 3. Where a person, desiring to take passage upon a freight train which carried passengers, applied several times to procure a ticket, but could not get one for the reason that the office was closed, and he then got upon the train and tendered the conductor the regular fare, explaining to him his inability to procure a ticket, but the conductor stopped the train and put him off, not at any station or regular place for passengers to get off; *held*, that the company was liable to such passenger in an action on the case for damages. 4. Where a passenger was put off the the cars of a railroad company by the conductor, for the reason that he had not procured a ticket at the station before getting aboard, and it appeared that the office at the station was closed, so that no ticket could be had; that the passenger so informed the conductor, and offered to pay the regular fare; that the place where the passenger was put off was not any station or usual place for putting passengers off the train, and that this was done in the night-time, whereby the passenger was compelled to walk back; *held*, that $200 damages were not excessive. [67 Ill.

Negligence of Railroad — Failure to give Warning of Approach of Train.—Illinois Central R. R. Co. v. Hoffman. [2 Am. L. T Rep. 467; S. C., 67 Ill.] Opinion by Sheldon, J. In this case the deceased was killed while rightfully engaged in unloading wood from a car standing upon the main side-track of the defendant's road. South of the car at which the deceased was at work, distant several feet, were two flat-cars and several box-cars. While he was so engaged, a freight train of defendant, coming from the north, passed near by on the main track, so that the deceased could readily have been seen by the employees of the company thereon. The servants of the company at the station either knew that he was so engaged at the time, or had reason to know the fact The train passed on until it passed the south end of the switch, when it commenced backing slowly on the side track for the purpose of leaving certain cars, and thus pushed the detached car next to that where the deceased was, so that he was crushed between the bumpers and killed. The only diligence on the part of the company was the ringing of its bell some forty rods south of the deceased, and on the main track. No other warning was given to the deceased, who was not acquainted with the mode of switching cars, or aware that he was in danger. He could not see the train on the south, on account of the box-cars: *held*, that the company was liable in an action for causing his death, and that the deceased was not guilty of such negligence on his part as to prevent a recovery.

COMMERCIAL AND LEGAL REPORTER: SEPTEMBER 29.*

Rights of Sureties—Bill Quia Timet.—W. B. Miller v. John H. Speed *et al.* Supreme Court of Tennessee. Opinion by Deaderick, J. 1. Upon bill filed by the surety upon the forthcoming bond of a decedent, who was the husband of the life-tenant of a fund, to be indemnified against probable ultimate loss of the fund, upon the ground that by the changed condition of the property of his principal since his death, and since the complainant became his surety, he fears he will finally have to pay the amount, if permitted to remain unprovided for until the termination of the life estate; held, that complainant was entitled to relief against the personal representatives. 2. Where property is covenanted to be secured for certain purposes, and in certain events, and there is danger of its being alienated or squandered, courts of equity will interpose to secure the property for original purposes; and to this end will require security to be given, or will place the property under the control of the court.

WASHINGTON LAW REPORTER, OCTOBER 5.

Slander—Pleading.—J. B. Cramer v. P. Cullinane, Supreme Court, District of Columbia. A declaration in an action of slander, in which there is a claim for special damage, on account of the plaintiff having been prevented from obtaining employment by reason of the slander, ought to name the parties by whom such employment was refused. If not so stated, no evidence of particular persons having refused to employ the plaintiff, will be received.

CHICAGO LEGAL NEWS, OCTOBER 2.

Conspiracy to defraud the United States out of Tax on Spirits.—U. S. v. S. Rindskopf *et al.* United States District Court, Western District of Wisconsin. Opinion by Hopkins, J. 1. A conspiracy is an agreement or combination between two or more persons to effect the purpose declared by the act to be illegal. It consists in an agreement expressed or implied, to do one of the things prohibited in the act. The indictment here charges the conspiracy to be to defraud the United States out of the tax upon certain spirits to be distilled at the distillery of Alexander Rogers in Middleton. The first count charges an agreement to manufacture illicit spirits at that place. In other parts it is alleged also that the agreement was to do so by breaking seals and stamps placed upon certain tubs, and to use them unlawfully for the purpose of manufacturing illicit spirits. *Held*, that the gist of the offence was the illegal conspiracy to manufacture, and that the particular manner in which it was done or to be done, was not the material question in the case; that the question to be determined under this count was whether there was a conspiracy between the parties to manufacture and remove spirits so manufactured without the payment of the lawful tax to defraud the United States. If the parties, or any two of them, entered into a scheme to illegally manufacture spirits, with intent to defraud the government out of the tax by law imposed thereon, it is a conspiracy within the meaning of the act, whethe a seal or stamp was broken or not. 2. That the fact that each of the overt acts constitutes an offence is no answer to the indictment for conspiracy. Upon a charge of conspiracy, an overt act, which is itself criminal, may be proven to show the existence of the conspiracy charged.

Removal of Causes to Federal Courts.—Mayo v. Taylor, Circuit Court Alexander Co., Ills. Opinion by Baker, J., construing the recent act of Congress. 1. It is the correct practice for the state court, in applications for the removal of suits under the act of 1875, to act upon the petitions and bonds. Such a practice is consonant with the practice prior to the act of 1875. 2. The mandate that the state court shall "accept said petition and bond," implies that the state court should take some action, make some order in the case. 3. If a petition and bond are filed in term time for the removal of a cause, the court should ascertain that the applicants are "entitled to the removal," before it ceases to exercise jurisdiction. If the petition and bond are filed in vacation, and a copy of the record filed in the federal court, it would, upon motion, if fully satisfied that the party filing the petition was not "entitled to the removal," order the cause to be placed on the docket, and proceed to trial there, as in other cases. 4. Where the plaintiff was a citizen of New York, one of the defendants a citizen of Missouri, the other of New York, and the Missouri defendant appeared and moved for a continuance for want of service on his co-defendant, and the plaintiff took a rule on the Missouri defendant to plead, etc., etc.; that under the Illinois statute and the act of Congress, it was a controversy wholly between citizens of different states, and that the Missouri defendant was entitled to have the suit removed on his petition into the federal court.

*Nashville, Tenn: James D. Park, Esq.

Legal News and Notes.

—MR. JUSTICE SMITH, of Savannah, in an elaborate opinion, has decided that an umbrella is property.—[*St. Louis Globe.*

—"WOE unto you also, ye lawyers; for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers."—[Luke xi, 46.

—A LADY in England has lately been fined £5 for giving a false testimonial of character to a friend, named Helm. She said that Helm had lived with her for two years, and had proved an honest and sober servant; when, in fact, the two were merely on terms of calling acquaintance, and she finding her friend in distressed circumstances, took this method of rendering a kindly service. If the law was enforced with equal severity in this country, the custom of men in office of signing their names to recommendations of people whom they do not know, would cease.

—MURDER EXCUSED AS A PUBLIC GOOD.—The recent killing of the *soi-disant* Irish giant, by his partner, Michael Finnell, has called forth from many papers favorable comments. As though O'Baldwin's death was worth more to the world than his life, and thanks were due to him who caused the change. To encourge such acts is to establish the right of every man to judge every other as to his fitness for this world or the next, and to give this self-appointed judge the power to put the verdict into execution. Such sentiments are worthy of reprobation alone, and should come only from those who think justice is not for high and low alike, but would introduce lynch law and turn society into anarchy.

—SIR EDWARD S. CREASY.—Sir Edward Creasy has retired from the office of Chief Justice of Ceylon with a pension of 1,600*l.* per annum. Sir Edward is the son of Mr. Edward Hill Creasy, of Brighton, and was educated on the foundation of Eton. In 1832 he was elected a scholar of King's College, Cambridge, where he became a Fellow in 1834. He graduated B. A. in 1835 and M. A. in 1838. He was called to the bar at Lincoln's Inn in 1837, and belonged to the Home Circuit. He was for several years professor of Ancient and Modern History in the University of London, to which office he was appointed in 1840. He also held for some time the post of Deputy Assistant

Judge at the Middlesex Sessions. He was appointed Chief Justice of Ceylon in 1860, when he received the honor of knighthood. He has produced the following works: "The Fifteen Decisive Battles of the World," "The Rise and Progress of the British Constitution," "History of the Ottoman Turks," "Biographies of Eminent Etonians," "Historical and Critical Account of the Several Invasions of England," "History of England," vols. 1 and 2, and "The Old Love and the New Love," a novel. During Sir Edward's tenure of office as Chief Justice of Ceylon he has altered the rules regarding admission to the bar, and has made a satisfactory knowledge of Roman Law indispensable to a candidate before he can be admitted to practice as an advocate of the supreme court.—[*The Law Journal.*

—A BILL has been introduced in the Upper House of Victoria, giving privileges to solicitors and incorporating a law institute. Another bill has been introduced in the Lower House by Mr. Coppin, the comedian, to amalgamate the solicitors with the barristers. It is difficult to predict the result of the collision between the two measures, but it is expected that Mr. Coppin's bill will have the best of it. Years ago Mr. Coppin succeeded in introducing the South Australian Land Transfer system against the opposition of all the lawyers in the House, and he may be equally successful in removing the barrier between the two branches of the profession without consulting the wishes of those on either side of it. It is kept up rigidly in Melbourne only. In the country districts men must be lawyers of all work, or do none. The persons most interested in the change have made no demonstration, but the solicitors generally and the best of the bar, are opposed to amalgamation.—[*The Law Journal.*

—CHARLES G. FISHER, late Assistant United States District Attorney, who was arrested last Saturday night on a charge of stealing the appeal bonds and papers in forty district cases, which had been appealed from the Police Court to the Criminal Court, waived an examination this morning, and was held to answer before the grand jury now in session. The police officers have recovered not only the papers charged to have been stolen but an additional number of equal importance. Fisher had placed them in the possession of another party, from whom they were obtained, and the object was to realize money on them. The revised statutes provide as a punishment for such an offence a fine of $2,000, or hard labor for three years, or both, in the discretion of the court. The accused is the son of Judge Fisher, late United States District Attorney for the District of Columbia.—[*New York Herald.*

—IT seems that there is an English statute concerning persons which provides that certain misdemeanants whose offences are only of a semi-criminal character are to be held only in a species of easy arrest, and are not to be treated to the rigors of prison discipline. Such was the confinement awarded to Colonel Baker—a punishment so light when compared with the crime committed, that even a journal as conservative as the Solicitor's Journal complains of it. That journal says: "We pointed out last week, with reference to the sentence on Colonel Baker, the propriety, in apportioning punishments, of taking into account special circumstances relating to the criminal. We did not then know, nor, we believe, did any one gather from the ambiguous terms used by Mr. Justice Brett in his sentence on the prisoner, that the learned judge intended to avail himself of the power conferred by the Prisons Act of 1865, and to direct that a prisoner guilty of a crime for which he said there was "no palliation"—a crime, he added, which "appears as bad as such a crime could possible be"—should be treated as a "misdemeanant of the first division," who under the Act is not to "be deemed a criminal prisoner within the meaning" of the Act. We are bound to say that this appears to us, if not a misapplication of the provision, which seems to have been inserted in the Consolidation Act to meet the case of misdemeanants whose offences were of a semi-criminal nature, at all events much more of an error on the one side than the infliction of hard labor would have been on the other."

—AN UNFORTUNATE PRECEDENT.—We observe by a dispatch from the West that a person named Shehan, charged with complicity in the Whisky frauds, has been found guilty of the offence, and that the penalty may be two years' imprisonment and five thousand dollars fine. We "view with alarm," as Judge Dennis Quinn would say, this tendency on the part of juries and judges to send statesmen to prison. There is no knowing how far the example may be followed. Shehan has not shown the proper courage. He should have come to New York and engaged some lawyer of the ability of Dudley Field and paid him twenty per cent. of his emoluments; and even if he had stolen six millions his punishment would have been simply nominal. So long as our criminal classes confine themselves to hams and overcoats and winter shawls the law is a "terror," and its "stern" administration will always be commended by a powerful and independent press; but when, ascending into the higher regions, they begin the work of robbing railroads and making "restitution," of robbing the treasury and proposing to start "a banking business" with the proceeds, and of cheating the government out of the revenue whisky tax, and of taking millions from the county court house, there is no reason why there should be any imprisonment or trouble whatever. Jay Gould is not imprisoned, yet he confessed by his act of "restitution" that he had several millions of dollars that did not belong to him. Mr. Tweed is only nominally under duress, yet everybody knows that he took six millions of the people's money—enough to build a rapid transit railroad. The worst we have been able to do with the leaders of the canal frauds is to put them under bail. What our whisky people should have done in St. Louis was, like Gould, to have made "restitution," or like Tweed, to have engaged an accomplished lawyer.—[*N. Y. Herald.*

—THE NEW COURTS OF EGYPT.—The Albany Law Journal recently published a letter of Hon. George S. Batchelder of Saratoga Springs, who was recently appointed a judge of the Supreme Court of Egypt, in which he states that there are three circuits, consisting of seven judges each, four foreign and three natives. I shall be assigned, probably, to the circuit at Cairo. The judges try all causes, as a jury sitting on the law and evidence, between natives and foreigners, and between foreigners of different nationalities, and as all the important business of Egypt is conducted directly or indirectly with foreigners, the jurisdiction covers almost everything. There are men in business in Alexandria and Cairo who have been there thirty years, and yet they are foreigners, and so are their children; in fact, all but Turks and Mahomedans generally (which include Arabs and Assyrians) are foreigners. Juries are called only in the cases of higher grade of crimes. The laws of Egypt are all embraced in the "Code Egyptien," which is modelled on the plan of the Code Napoleon, and is derived generally from the Roman civil law. This code is published in three different languages; French, Italian and Arabic, in one volume of 580 pages, and while I find much that is familiar in our own laws, there are many new and to me novel principles and rules laid down for the government of the affairs of business and the guidance of courts in the administration of the rules. It is permitted, however, in all cases where the code is doubtful or insufficient, to apply the rules of "natural right and equity." I find that the judges are generally men of learning and experience, while one or two are quite distinguished as jurists at home. So you will see that I have to work with an earnestness to keep up my end; and could you see me polling this code and cramming in the idioms and intricacies of the French language now, you would regard me for once as a marvel of industry. The mode of conducting trials here is so different from our own, especially in criminal cases, that at the risk of your knowing it all before hand and therefore boring you exceedingly, I will attempt to describe a trial in the Court of Assizes, which is like our Oyer and Terminer. The criminal was indicted for burglary. There are three judges in scarlet robes and caps trimmed with gold lace, the procureur-general (attorney-general) being robed in like manner and sitting on the bench at the left of the judges. The attorneys wear black robes and caps like the judges, without gold. The criminal is arraigned and the indictment read by the clerk. The jury sit on benches not unlike our own. After the reading of the indictment, the attorney-general makes a short speech to the jury, and the counsel for the prisoner follows. Then the novelty begins. The attorney-general sits quietly by, and so does the counsel for the accused, while the presiding judge examines the witnesses. Commencing with the prisoner himself, he puts him through a fire, sharp and severe, debating points with him and commenting on his statements as he rattles along. Then the witnesses are brought in and after being asked a few preliminary questions by the judge, he tells them to make their statements to the jury; here the judge often breaks in, and so does the prisoner, but seldom the attorney-general or the counsel. The prisoner often gets up a sharp discussion with the judge, and often addresses the jury, and occasionally judge, jury and attorneys all talk, keeping up a running fire for some time. And thus the evidence is taken. At the close the attorney-general sums up to the jury first, and is followed by the counsel for the prisoner, and then the judge sums up usually against the accused in his charge to the jury. In short, the judge acts as prosecuting attorney, counsel and judge, and makes himself generally felt in the case in all its phases. The other two judges sit by, solemn as justices of sessions. The Court of Appeals is a dignified body, and advocates address the judges much as at home. The commercial courts and courts of reconciliation in mercantile matters are very interesting, and are conducted with great dignity by both attorneys and judges.—[*Albany Law Journal.*

—TO REMOVE A CAUSE from a state to a United States court, it is necessary to allege more than that the plaintiff and defendant are citizens of different states. In the case of Pechner v. Phœnix Ins. Co., recently decided by the Commission of Appeals of New York, where the petition simply alleged that the defendant was a citizen of Connecticut and the plaintiff a citizen of New York, it was held that there must be an allegation of citizenship at the time of commencing the action, and that the averment as made was therefore fatally defective. The above decision is obviously correct, as otherwise it would be possible for one to defraud a state court of its jurisdiction by removing to another state, and then transferring the cause to a United States court.